













# THE INDIAN COMPANY LAW

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PART I

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# ADDENDA

## I

### PART I

**Page 122.** After the note-heading "Central Government" insert the following:—

**"215 B. Regulations and forms :—**For the Regulations and Forms prescribed by the Central Government under sub-ss. (1), (2), (3), (5) and (8) of this section, see the Companies Regulations, 1956 printed as Appendix B (towards its end).

**Page 135.** Before N. 248 insert the following:—

**"247 A. Form :—**As to the form of declaration of compliance with the requirements of the Act on application and registration of a company, pursuant to sub-s. (2) of this section, see Form No. 1 in Appendix B."

**Page 236.** Before N. 452 insert the following:—

**"251 A. Forms:—**For the form of return of allotment under sub-s. (1) of this section, see Form No. 2, and for the form of particulars of contract relating to shares under sub-s. (2), see Form No. 3 in Appendix B.

Copies of contract required to be filed with the Registrar under cl. (b) of sub-s. (1) of this section must be verified by an affidavit of a responsible officer of the company stating that they are true copies—see Rule 5 in Appendix B (towards the beginning)."

**Page 245.** Before N. 476 insert the following:—

**"Form :—**For the form of statement of the amount or rate per cent. of the commission, see Form No. 4 in Appendix B."

**Page 293.** Before N. 545 insert the following:—

**"544 A. Form :—**For the form of notice of consolidation etc. of shares pursuant to this section, see Form No. 5 in Appendix B."

**Page 294.** Before s. 98 insert the following:—

**"Forms :—**For the form of notice of increase of share capital under this section, see Form No. 6, and or the form of notice of increase in number of members, see Form No. 7 in Appendix B."

## II

**S. 10, Page 71. Proviso to s. 3 of the previous Act :—**The words of the Proviso did not expressly exclude the jurisdiction of the High Court in company matters, and hence, inspite of the issuing of a Notification by the Rajasthan Government under this Proviso, the Rajasthan High Court did not lose its jurisdiction in company matters—*In re General Assurance Society* (1956) Raj. 61. As to the effect of the above Notification, see this case.

**S. 17, Page 107. Add to the last para of N. 194:—**The mere fact that the appointment of the managing agent and the terms and conditions thereof and of his remuneration were mentioned in the object of the company would not make those provisions a *condition*. Those are merely details concerning the management of the company which is entitled to regulate those details without going to the Court for its sanction and without recourse to a special resolution as contemplated in the next section—*Chandulal & Co. v. Natwarlal* (1956) B. 257.

**S. 26, Page 125. After first para add :—**It is well established that the articles do not constitute a contract between the company and third persons and the latter will be precluded from relying on the articles as the basis of their claims, and must prove special contract. Hence it is not open to the policy-holders of an insurance company to take advantage of anything contained in the articles as giving them any beneficial interest or other claims, nor is it open to them to contend that the company is in the position of a trustee so far as the fund is concerned—*Doraiswami v. United India Life Assce. Co.* (1956) M. 316, (1956) 1 M.L.J. 344, (1956) M.W.N. 95.

**S. 26, Page 127. 229 A. Construction of articles :—**"The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it may be predicated that 'it goes without saying', some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended"—*Somesh Chandra v. Jivanlal* (1956) B. 190.

"This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise immediately to give effect to the intention of the parties"—*ibid.*

In construing articles the Court may take into account all the relevant articles together with the bye-laws. If the words used are ambiguous, an attempt should be made to adopt such a construction as would avoid a conflict between the articles and the bye-laws—*Shiv Onkar v. Bansidhar* (1956) B. 459, (1956) Bom. 100. Bye-laws are, however, subordinate to the articles—*ibid.* If there is a rule or a bye-law specifically providing for the hearing of a dispute by a fluctuating body of arbitrators, the plea that the same arbitrators have not heard the dispute would not invalidate the award—*ibid.*

An article provided that it would be obligatory on every member with regard to all claims and disputes between him and other members to settle them first by arbitration. It was *held* that a dispute as to the existence of the transaction or dealing itself was not covered by the articles and there was no obligation upon any member to refer such dispute to arbitration—*ibid.*

**S. 31, Page 133. After second para of N. 243 add. Insurance Company :—**The policy-holders of an insurance company are not entitled to amend its articles. But they have got a right to say, if they are beneficiaries of the policy-holders' trust-fund, that the terms of the original trust-deed could not be altered without their con-

sent—*Dorniswami v. United India Life Asso. Co.* (1956) M. 326, (1956) 1 M.L.J. 344, 1956 M.W.N. 95.

**S. 55, Page 182 (top).** After first para add :—Where the circular neither involved an offer for purchase of shares, nor invited subscription for shares, the circular issued was held not to be a prospectus within the meaning of that term in the definition of a prospectus [s. 2 (36)]—*Goul. Stock &c. Investment Co. v. Christopher* (1956) 1 A.E.R. 499.

**S. 56, Page 186. N. 347 add :—347 A. Sub-s. (3) “Form of application for shares”** :—The reference in sub-s. (3) to a form of application for shares bears no wider meaning than in the definition of “prospectus” contained under s. 2 (36)—*ibid.* In this case the document described as “form of acceptance and transfer” was held not to be an application for shares within the section, but was the communication of an offer to exchange shares.

**S. 125, Page 351. After the last word of N. 645 add :—**But in these later cases the Madras High Court has fallen in line with the above mentioned view of the Bombay High Court in case note (57)—*Ramamurti, O. L. v. Indian Bank* (1956) M. 234; *Ramanathan v. Dingari Ltd.* (1956) 1 M.L.J. 328.

**S. 36, Page 144. After first para add :—**The articles would constitute a general contract containing an arbitration clause, and all such contracts would attract the provisions of the latter. The position in respect of oral contracts, made between one member and another, would not be materially different from the position of contracts which are made expressly subject to the articles—*Shiv Onkar v. Bansidhar* (1956) B. 459, (1956) Bom. 100.

**S. 36, Page 144 (bottom).** In case note (64) add :—*Shiv Onkar v. Bansidhar* (1956) B. 459, (1956) Bom. 100.

**S. 205, Page 479. Just before N. 888 add—887 B. Dividend—meaning** :—The ordinary meaning of dividend is the receipt by the shareholder of parts of profits of the company. The formalities and technicalities attached to the declaration of a dividend cannot detract from this ordinary meaning—*Kantilal Manilal v. Comr. of Income-tax* (1956) B. 381. Dividend need not be declared in cash, it may be in specie—*ibid.*

**S. 397, Page 731. After first para of N. 1175 A add :—**This section is intended to confer alternative power on the Court to make suitable orders without winding up the company, where the facts justify the passing of a winding up order, but it would unfairly and materially prejudice the interests of the company or any part of its members—(1956) Andhra L. T. 207 (1956) Andhra W. R. 123.

**S. 398, Page 733. After N. 1177 A add :—**Where in a petition it was complained that there was mismanagement of the company which ended in grave defalcation and which also threatened the company with ruin, it was held that the Court was entitled to interfere under the corresponding s. 153C of the previous Act—(1956) Andhra L. T. 207, (1956) Andhra W. R. 123.

## PART II.

**S. 426, Page 5. After second para add :—**The right which a liquidator has against a contributory, being statutory and not contractual, there is no cause of action which survives to the liquidator where a company went into liquidation after the filing of a second appeal against a contributory, during its pendency the liquidator cannot be brought on the record as the representative of the erstwhile company—*Krishna v. Sethu* (1956) 1 M.L.J. 486, (1956) M.W.N. 286, 69 M.L.W. 294.

**S. 433, Page 30. After last para add :—**The words "just and equitable" not being *ejusdem generis* with cls. (a) to (f), whether mismanagement of the directors is a ground for winding up order under cl. (f) of this section becomes a question to be decided on the facts of each case. Where nothing more is established than that the directors have misappropriated the funds of the company, an order for winding up would not be just and equitable, because, if it is a sound concern, such an order must operate harshly on the rights of the shareholders. But if, in addition to this circumstances exist which render it desirable in the interests of the shareholders that the company should be wound up, there is nothing in cl. (f) which bars the jurisdiction of the Court to make such an order—*Rajahmundry Electric Supply Co. v. Nageshwara* (1956) S.C. 213.

**S. 439, Page 47. After N. 1297 add :—**The trustee in bankruptcy of a shareholder is not entitled to present a petition for compulsory winding up of the company, because s. 431 begins to operate only after a winding-up has begun—*H. L. Botton Engineering Co.* (1956) 1 A.E.R. 799.

**S. 512, Page 216. At the end of N. 1746 add these new paras :—**By virtue of cl. (b) of sub-s. (1) of this section the liquidator in a voluntary winding up does not require the sanction of the Court before instituting a suit in the name and on behalf of the company—*L. Gupta v. Vishnu Baburao* (1956) N. 204. Where the plaintiff is described in the plaint of such a suit as "Shri V. B. S. Liquidator for and on behalf of. .... Co. Ltd. (in voluntary liquidation)," the description was held to be in accord with the statute—*ibid.*

Under s. 429 the liability of a contributory is created a debt payable at the time specified in the calls made on him by the liquidator. A suit for recovery of this debt is governed by Art. 120, Limitation Act, and limitation runs from the time specified for payment of the calls made by the liquidator—*ibid.* A part of the cause of action of such a suit arises when the event occurs, and at a place where the winding up of the company and the appointment of the liquidator are decided upon and a Court at that place will therefore have jurisdiction to entertain the suit—*ibid.*

The liquidator can, under cl. (d) of sub-s. (1) exercise the power of making calls without reference to the Court—*ibid.*

**S. 529, Page 249. Just before N. 1829 add :—**Property held by an insolvent company in a fiduciary capacity is treated as property held in trust for the purposes of the insolvency laws, and



property held for a specific purpose of the insolvency laws, and property held for a specific purpose is treated as clothed with a species of trust subject to the same principles as trust property.—Per Chakravarti, C.J. in *Ganesh Export and Import Co. v. Mahadevalal* (1956), C. 188, 59 C.W.N. 891.

The test as to whether there is a loan or a trust in the case of a deposit of a sum for a specific purpose is this: where money is paid merely on condition of repayment and payment of interest till then, there is only a loan; but where the main condition of the deposit shows that the corpus of the fund is being handed over in confidence to be held for the benefit of some person or object, the provision for payment of interest is only a provision for increase or improvement of the fund, and there is no loan, but a trust—*ibid*.

**Table A, reg. 76 (1), Page 473. Just after N. 2255 add :—**The chairman of a company who is also its treasurer and in whom the administration of the company is vested under its articles cannot escape liability by pleading that he entrusted the entire management to another person and therefore he is not responsible for the extensive acts of misappropriation committed by the vice-chairman—(1956) Andhra L. T. 207, (1956) Andhra W.R. 123.

## CORRIGENDA

At the top of pages 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69 and 71 of Part I, after the words "Companies Act" for the figures "1955" read "1956".

**Appendix G. Capital Issues (Application for Consent) Rules 1954. Schedule. Notice.** In para 7 after the words "State the extent of the", insert "interest of the", and for "of the company" read "in the company".

# INTRODUCTION.

## Preliminary.

1. The history of legislation regarding companies, as opposed to mere partnerships, has been shortly delineated in the beginning of this book, namely, Notes 1 to 8. The previous Act, that is, Act VII of 1913 was based on, and was almost a verbatim reproduction of, the English Companies Act of 1908. In 1929 this English Act was thoroughly overhauled. This, as well as a growing demand which became more and more insistent since the passing of the English Act of 1929, for making more stringent provisions regarding the powers, duties and responsibilities of promoters, directors and managing agents, resulted in the passing in India of the Companies (Amendment) Act of 1936.

## The Companies ( Amendment ) Act, 1936.

2. This amending Act, namely, the Act No. XXII of 1936 did not take the form of a consolidating Act, and did not therefore alter the arrangement of the sections of the Act of 1913, but introduced provisions most of which were verbatim copies of the new provisions of the English Act of 1929, although there were certain provisions and amendments for the purpose of dealing with problems peculiar to this country. Some special provisions relating to banking companies were also made taking into consideration the recommendations of the Central Banking Enquiry Committee. These latter provisions were however taken out of the Act by the Banking Companies Act X of 1949.

## Subsequent Amendments.

3. Thereafter the following further amendments were made in Act VII of 1913 :—Act XX of 1937 amending s. 93 and repealing sub-s. (1C) of that section ; the Government of India (Adaptation of Indian Laws) Order, 1937 amending ss. 6, 7, 8, 11, 87C, 109, 232, 245 and 286, and inserting cl. (17) in s. 2, and the new ss. 2A, 42A, and 289A ; Act II of 1938 amending ss. 17, 34, 86D, 86I, 87D, 102, 130, 134, 153A, 237, 277, 277D, 277E, 277F, 277I, 277M, 284, regulations 56, 77, 106, 109, 116 of Table A, Form I in the Second Schedule and Form F in the Third Schedule ; Act XXXIV of 1939 amending ss. 83, 107 and 207 ; Act XXXII of 1940 amending ss. 152 and 208C ; Act XXXVI of 1940 inserting the new s. 244B ; Act XXVI of 1941 amending ss. 104 and 282B ; Act XVII of 1942 omitting s. 54 and amending s. 153 ; Act XXI of 1942 amending s. 277F ; Act XXX of 1943 amending ss. 132 and 151, reg. 107 of Table A and Form F in the Third Schedule ; Act IV of 1944 inserting the new s. 277HH, substituting the new s. 277I for s. 277I and amending s. 277L both introduced by the amending Act XXII of 1936 ; Act IV of 1945 adding sub-s. (6) to s. 282B ; Act VI of 1945 amending ss. 131A and 151 ; Act XIII of 1946 adding proviso to sub-s. (2) of s. 282B ; and the India (Adaptation of Existing Indian Laws) Order, 1947, making amendments in various sections of the Act. Thereafter verbal alterations were made in a large number of sections by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 and by the Adaptation of laws Order, 1950.

## INDIAN COMPANY LAW

4. In 1951 further important amendments were made to the Companies Act, 1913 by introducing the following new sections by Act LII of 1951, namely :—

S. 86J, putting restrictions on the appointment, reappointment and number of directors, their remuneration, etc.

S. 87AA, putting restrictions on extension of the term of office of managing agents.

S. 87BB, putting restrictions on change in the constitution of a managing agent.

S. 87CC, putting restrictions on amendment of articles or agreement relating to the appointment or remuneration of managing agents, etc.

S. 153C, giving power to the Court to act when a company acts in a prejudicial manner or oppresses any part of its members.

S. 153D, stating the effect of termination of managing agency agreement, etc.

[SS. 153C and 153D were enacted to provide alternative remedy to winding up in cases of mismanagement or oppression].

S. 280B giving power to the Central Government to appoint advisory commission and to make rules in respect of certain matters.

By the same Act LII of 1951 a proviso was inserted in s. 87B after cl. (c) thereof making a transfer of office by the managing agent subject to the approval of the Central Government.

Lastly by Act LI of 1952 sub-s. (4) was inserted in s. 91B giving power to the Central Government to direct by notification in the Official Gazette that s. 91B shall not apply to a public company or shall apply thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

See para 5 *post*.

### Companies whose registered offices were in Burma and Aden.

5. Since the separation of Burma, Aden and Pakistan from India companies whose registered offices were immediately before the date of separation at those places are deemed to be companies registered and incorporated outside and as such will not be included in the expressions "company," "existing company," "public company" and "private company". See sub-s. (2) (a) of s. 3. A company the registered office whereof is in the State of Jammu and Kashmir and which immediately before 26th January, 1950 was a company as defined in s. 3 (1) (i) will also be deemed to have been formed and registered outside India and will not be included in the expressions "company" etc. mentioned above [s. 3 (2) (b)].

### Illegal Associations.

6. No company, association or partnership, consisting of more than ten persons in the case of a banking business, and of more than twenty persons in the case of any other business, the object of which is the acquisition of gain, can be legally formed unless it is registered under the present Act, or is formed in pursuance some other Indian law. So partnerships consisting of more than the aforesaid numbers of persons, unless so registered, will be illegal associations with all their consequent risks and disabilities (see s. 11 and notes thereto). Sub-s. (3) of s. 11 says that this section shall not apply to a joint family as such carrying

on a business. But where two or more such joint families form a partnership they will, it is apprehended, come within the mischief of this section, but in computing the number of persons the minor members of such families will be excluded.

Sub-s. (5) provides that every member of such illegal association will be punishable with fine which may extend to Rs. 1000.

Sub-s. (4) says that every member of such an association carrying on business will be personally liable for all liabilities incurred in such business.

### Companies Authorized to be Incorporated.

7. Companies authorized to be incorporated under the Act may be, (a) companies limited by shares—these must have share capitals divided into shares of a fixed amount, (b) companies limited by guarantee—these may be with or without share capital and (c) unlimited companies (see ss. 12 and 13). These companies may be either public companies or private companies. See s. 12 (1) For the definition of a public company see s. 3 (1) (iv) and for the definition of a private company see s. 3 (1) (iii).

8. Companies mentioned in s. 565 (1) (a) and (b) may be registered under the Act in accordance with the provisions of Part IX even if the sole object of such registration be that the companies may be wound up.

9. An unregistered company as defined in s. 582 including any partnership, association or company consisting of more than seven members may also be wound up as provided in part X of the present Act.

### Formation of Companies.

10. Any 7 or more persons or where the company to be formed is a *private company* any 2 or more [not exceeding 50 see s. 3 (1) (iii)] persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association form an incorporated company with or without limited liability [s. 12 (1)].

11. The companies authorized to be *incorporated*, (as distinguished from *registered*) under the Act must state in the memorandum of association, (i) the name of the company, with "Limited" as the last word in the case of a public limited company and with "Private Limited" as the last words in the case of a private limited company, (ii) the objects of the company, and except in the case of "trading corporations" [for definition see cl. (49) of s. 2], the State or States to whose territories they extend. If the company has a share capital (which is obligatory in the case of a company limited by shares) the memorandum must state the amount of share capital with which the company is proposed to be registered, and the division thereof into shares of a fixed amount. Each subscriber must write opposite to his name the number of shares he takes, but he cannot take less than one share. See s. 13.

12. In the case of a company limited by shares or a company limited by guarantee the memorandum shall also state that the liability of the members is limited. See sub-s. (2) of s. 13.

13. In the case of a company limited by guarantee the memorandum must comply with the provision of sub-s. (3) of s. 13.

14. In the case of an unlimited company the memorandum should comply with the provisions of sub-s. (4) of s. 13.

15. Any company registered as a limited company or an unlimited company under this Act or any previous companies law may register or re-register under the present Act, as an unlimited company or a limited company, respectively. See s. 32.

16. As to the companies authorized to be registered under the present Act and the provisions therefor see Part IX of the Act.

### Objects of a Company.

17. The question whether a company should be incorporated as a company limited by shares, or a company limited by guarantee or an unlimited company generally depends upon the object for which it is going to be formed. If the object is to promote commerce, art, science, religion, charity or any other useful object and not to pay any dividend to its members, it may be formed as a limited company under s. 25 of the Act. On registration such a company will enjoy all the privileges of limited companies and be subject to all their obligations except those of using the word "Limited" as a part of its name, of publishing its name and of filing a list of members with the Registrar of Companies, if the Central Government so directs and to the extent specified in the direction. Such companies are usually registered as companies limited by guarantee. For detailed provisions see s. 25. As to the fees to be paid for registration of such a company under s. 25 see Part II of Schedule X.

As observed in Palmer's Company Law [13th ed., p. 404] "Companies with unlimited liability are rarely formed now. While limited companies have been increasing by 'leaps and bounds,' unlimited companies have dwindled nearly to zero."

18. Where the object of a company, association or partnership or any individual member thereof is to carry on business for the acquisition of gain, it must be registered under the present Act or some other Indian law, if it consists of more than ten persons in the case of a banking business and more than twenty persons in any other case. Otherwise it will be an illegal association with all its risks and disadvantages (see s. 11 and notes thereto).

19. Generally speaking a limited company is formed for the following purposes :—(1) to carry on a contemplated new business or a number of new businesses ; (2) to acquire an existing business ; (3) to convert business owned by individuals or a firm into limited company ; (4) to form a syndicate for the purpose of working a patent, option or concession or developing an infant industry and then to sell it at a profit to a new company promoted by the syndicate or to any other company.

### Formation of Companies Limited by Shares.

20. So that a company may be launched, some person or persons must conceive the idea, give it a practical shape, and take steps to get it registered and try to secure the necessary share capital. The person or persons who do this are called promoters of the company. For the meaning of the term "promoter" and his duties, obligations and liabilities see s. 62 (6) (a) and notes to that section.

## INTRODUCTION

21. If the idea is to acquire and carry on an existing business, the promoters should think out in consultation with the vendors the following details and settle them in writing :—(1) the amount of money for which the vendors are willing to sell the business with its goodwill, plant, machinery and all movable and immovable property in connection with the business, (2) the amount required to set it a-going and to meet the working expenses; (3) the amount necessary for carrying out urgent improvements; (4) the authorized share capital with which the company is to be registered; and (5) the amount of the probable preliminary expenses (as to what are preliminary expenses see N. 356, under s. 56).

### Name of a Company.

22. When all these have been satisfactorily settled a suitable name, under which the company is to be registered, should be selected. Where the goodwill of the business to be acquired is of any value, the name in which it is carried on may be retained with the addition of some other suitable words and "Limited" as the last word.

23. Where it is necessary to give a new name to the company the provisions of s. 20 should be complied with (see notes to s. 20). After selecting a name it is better to secure the approval of the Registrar of Companies before the printing of the memorandum of association &c. so that it may not clash with that of a company in existence. For a name which is identical with, or too nearly resembles the name of an existing company may be deemed undesirable; and a company will not be allowed to be registered by a name which, in the opinion of the Central Government, is undesirable (s. 20). As to the procedure for rectification of an undesirable name, see s. 22, and as to the effect of such a change of name, see s. 23.

### Agreement with Vendors.

24. Now it is time to enter into an agreement with the vendors for acquiring the business. Before incorporation of the company this is usually done by the promoters on behalf of the company. Such a contract is valid and specific performance thereof may be enforced against the company, provided that the company has adopted the contract and that the object clauses of the memorandum of association warrant it [see s. 27, cl. (e) of the Specific Relief Act (I of 1877)]. For form of such an agreement see Form 1 and for form of adoption thereof see Form 2 in App. E.

An agreement to sell a business may also be made with the company after its incorporation (see Form 3 in App. E).

25. It should be remembered, however, that whether the agreement is made before or after the incorporation, it is provisional only and not binding on the company until it gets from the Registrar the certificate for commencement of business [see s. 149, sub-s. (4)].

As to the agreement to issue fully paid shares to vendors see Form 8 in App. E.

### Memorandum of Association.

26. The memorandum of association must be printed, divided into paragraphs numbered consecutively and signed by each subscriber (who must add his address, description and occupation, if any) in the

presence of at least one attesting witness who is to attest the signature and who shall likewise add his address, etc. The signature of a subscriber cannot be attested by another subscriber. See s. 15 and notes.

27. For the contents of the memorandum of association of a company see s. 13 and for Forms see s. 14 and Tables B, C, D and E in Schedule I. For the specimen of a complete memorandum with all necessary object clauses in the case of a company formed to purchase an existing business as a going concern see Form 9 in App. E, for that of a company intended to do general business see Form 10 in App. E and for that of a manufacturing company, see Form 11 in App. E.

(1) *Name in the memorandum.*

28. The memorandum should contain the name of the company with "Limited" as the last word and in the case of a private company "Private Limited" as the last words [s. 13 (1) (a)]. As regards the selection of the name see the paras under the heading "Name of Company", supra. A company may, by passing a special resolution and with the approval of the Central Government, change its name [see s. 21 and notes]. Where a company is, through inadvertence or otherwise, registered with a name identical with or similar to that of an existing company, it may be changed following the provisions of s. 22. In such cases a fresh certificate of incorporation is to be obtained from the Registrar (see s. 23).

(2) *The State in which the registered office will be situated.*

29. Next, the State in which the registered office is to be situated, e.g., Madras, Bombay, Assam, &c. is to be stated in the memorandum [s. 13 (b)]. A company may by passing a special resolution change the registered office from one State to another subject to confirmation by the Court [see s. 17 and notes thereto].

(3) *Objects of the company.*

30. Much care and circumspection is necessary in drafting the object clauses. The objects should be lawful and they must not offend against the provisions of the Act [e.g., prohibition of purchasing its own shares and of giving financial assistance in connection with such purchases (s. 77)], the general law (e.g., running a lottery) or be immoral (e.g., keeping a brothel) or opposed to public policy (e.g., sale of public office).

31. The memorandum must state the objects of the company and, except in the case of trading corporations as defined by s. 2 (49), the States, or States to which they extend [see s. 13 (c)].

32. The objects should be clearly and definitely expressed. It is not enough to say that the object of the company is to carry on any business which it may think profitable, for this defines nothing. In the case of a trading company the trade should be defined and not the various acts which it would be within the powers of the company to do in carrying on the trade. Wide powers taken in general terms will be construed ancillary to the specific objects mentioned in previous clauses. But objects should not be confused with powers; the memorandum should state the *objects* of the company and not the *powers* (see N. 168

under s. 13). In this view the power to borrow money need not be taken in the memorandum of association; it is sufficient if the power is taken in the articles of association. But it is safe to take the power in the memorandum, for a company other than a trading or a banking company has no implied power of borrowing (see N. 170 and N. 653).

33. In App. E. specimens of the main object clauses of various companies are given (see Forms 17 to 63). These with additions and alterations may be used for drafting the objects clauses of the memorandum of association taking suitable clauses from Forms 9, 10 and 11 of App. E.

34. Companies are often formed specially for acquiring and taking over the business of persons, firms or other companies or for amalgamating with other companies. For the first object clauses of such companies see Forms 13 to 16 in App. E.

#### (4) *Limitation of liability.*

35. The memorandum of a company limited by shares or guarantee should state that the liability of the members is limited [s. 13 (2)]. In case a company limited by shares is wound up, a member will not be bound to pay anything more than the amount unpaid on the shares taken by him [see s. 426 (1) (d)], and in the case of a company limited by guarantee anything more than the amount undertaken to be contributed by him in the event of its being wound up [see s. 426 (1) (e)].

#### (5) *Capital clause in the memorandum.*

36. The memorandum of a company limited by shares must also state the amount of share capital with which the company is proposed to be registered and the division thereof into shares of a fixed amount. Each subscriber of the memorandum shall write opposite to his name the number of shares he takes; but he cannot take less than one share [s. 13 (4)]. If the memorandum defined the rights attached to a particular class of shares, they could not under the previous Act be varied except with the sanction of the Court in a proceeding under s. 153 thereof, unless the memorandum also gave the power to alter such rights (see Notes 185, 2091 and 2093). In this connection see ss. 106 and 107.

37. The classes into which the shares are divided and their respective rights regarding dividends and voting are more properly stated in the articles of association. Therefore the question of the capital clauses will be discussed under the heading "Articles of Association" *post*. But as these capital clauses defining the rights &c. of the respective classes of shareholders are generally included in the memorandum of association, forms of such capital clauses are given in App. E (see Forms 69-72). With the necessary alterations they may be incorporated in the articles of association.

#### (6) *Association and subscription clause.*

38. The association and subscription clauses should be in the forms given in Table B of the First Schedule to the Act. Any person except a minor, a lunatic or a firm in the firm name may be a subscriber to the memorandum of association (see N. 150). In the signature the full name should be given. Address, description and occupation should also be explicitly stated [see s. 15 (c)]. If the subscriber has no occupation, the



fact should be mentioned. There must be at least seven subscribers except in the case of a private company where at least two are required. An agent may sign the memorandum on behalf of his principal where authority in this respect is given by the principal (see N. 190).

39. The signature must be attested by a person who sees the subscriber sign. If all the subscribers sign in the presence of one person he may attest all the signatures, otherwise different witnesses will be necessary. The signature of a subscriber cannot be attested by himself or by another subscriber (see N. 189).

#### *Alteration of the memorandum.*

40. A company cannot alter the *conditions* contained in its memorandum except in the cases, in the mode and to the extent provided in the Act. But only those provisions which are required by s. 13 or by any other specific provision in the Act to be stated in the memorandum will be deemed to be such conditions (see s. 16). Any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature, incidental or subsidiary to the main objects of the company, will not be deemed to be such conditions. The object of this provision appears to be to frustrate the designs of such managers, managing agents and secretaries etc. as try to perpetuate their office by inserting clauses to that effect in the memorandum of association [see s. 16 (3) and notes thereto].

41. The memorandum of association can be altered only, (1) as to the change of the registered office from one State to another and (2) with respect to the objects within the limits mentioned in s. 17 by passing special resolution and obtaining the sanction of the Court (see s. 17 and notes). A certified copy of the order *confirming* the alteration with a printed copy of the memorandum as altered should be filed with the Registrar within 3 months of the order for registration upon which only the alteration will take effect (see ss. 18 and 19).

42. S. 38 provides that no member shall be bound by an alteration made in the memorandum or articles after the date on which he became a member, if and so far as the alteration requires him to take or subscribe for more shares or in any way increases his liability, unless the member agrees in writing to be bound by the alteration.

43. S. 40 provides that when an alteration is made in the memorandum or articles every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration, and sub-s. (2) provides penalty for contravention of this provision.

#### *Stamp and fees.*

44. As to the stamp for the memorandum of association see App. F and as to the fees to be paid to the Registrar of Companies for registration see the Tenth Schedule of the Act. The stamp must be affixed before the memorandum is signed.

#### *Articles of Association.*

45. The articles of association contain the regulations of the company. They must not contain anything which is against, or repugnant to,

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the provisions of the Act, nor should they go beyond the scope of the memorandum of association to which they are subordinate. For their respective functions and other matters relating to the articles, see s. 26 and notes thereto.

46. In the case of a company limited by shares it is not obligatory to register any articles of association. If they are not registered, the provisions of Table A in Schedule I will automatically apply to the company (see s. 28 and notes). A new set of articles for the management of the company may be and often is registered excluding Table A altogether or in part, for the provisions of Table A will apply to a company in so far as its articles do not exclude or modify them (see s. 28).

47. The articles must be printed, be divided into paragraphs numbered consecutively and signed by the subscribers to the memorandum (who must add their addresses, descriptions and occupations, if any,) in the manner the memorandum is to be signed (see s. 30).

48. The articles by numbered clauses should make provisions as to (1) the exclusion, total or partial, of Table A; (2) definition of important words and phrases; (3) adoption or execution of a preliminary agreement, if any; (4) capital clauses specifying the different classes into which the share capital of the company will be divided and defining the rights of the respective classes regarding dividends, bonuses, voting and modification of those rights; (5) allotment of shares; (6) share certificates; (7) calls; (8) forfeiture, surrender and lien; (9) transfer and transmission of shares; (10) increase and reduction of capital; (11) consolidation and sub-division of shares; (12) borrowing; (13) general meetings, proceedings thereof and votes and proxies of members; (14) management; (15) directors, their qualifications, remuneration, rotation, &c. and board meetings; (16) dividends, reserve and depreciation funds; (17) accounts and audit; (18) common seal; (19) notices and (20) special provisions in the winding up.

49. Unless powers are taken in the articles the following acts cannot be done :—

- (1) Having official seal for use outside India—s. 50.
- (2) Paying commissions and fixing rate thereof for subscribing or agreeing to subscribe etc. any share in the company—s. 76.
- (3) Issuing redeemable preference shares—s. 80.
- (4) Accepting unpaid share capital, although not called up—s. 92.
- (5) Paying dividend in proposition to the amount paid up—s. 93.
- (6) Altering the company's share capital by increasing, consolidating and dividing, converting into stock and re-converting it into fully paid up share, sub-dividing or cancelling etc. its share capital—s. 94.
- (7) Reducing share capital of the company by special resolution—s. 100.
- (8) Altering the rights of holders of special classes of shares—s. 106.
- (9) Refusing to register transfer of shares of a member in or debenture of the company—s. 111 (1).
- (10) Issuing share warrants to bearer—s. 114.
- (11) Providing that the bearer of a share warrant may be a member of the company for certain defined purposes—s. 115 (5).
- (12) Prohibiting the re-issue of redeemed debentures in certain cases—s. 121 (1) (a).

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(13) Keeping branch register of members or debenture-holders outside India—s. 157.

(14) Making regulations in regard to the company's foreign register—s. 158 (8).

(15) Specifying or making in the cases a *private company* which is not a subsidiary of a public company provisions other than those mentioned in ss. 171 to 186 but relating to the same matters—s. 170 (1) (ii).

(16) Providing for matters mentioned in ss. 171 to 175 and ss. 177 to 186—s. 170 (2) (b).

(17) Providing for quorum of a general meeting a number larger than that mentioned in s. 174—s. 174.

(18) Making provision for chairman of a general meeting—s. 175.

(19) Making provisions other than those mentioned in the Proviso to sub-s. (1) of s. 176, relating to proxies at a general meeting—s. 176.

(20) Restricting the exercise of voting rights by members who have not paid calls, etc—s. 181.

(21) Requiring special notice of a resolution at a general meeting—s. 190.

(22) Paying interest out of capital in certain cases mentioned in s. 208—s. 208 (2).

(23) Providing that persons other than subscribers of the memorandum shall be the first directors—s. 254.

(24) Making provisions that the directors mentioned in sub-s. (2) of s. 255 shall not be appointed in general meeting—s. 255 (2).

(25) Fixing limits of the number of directors—s. 258.

(26) Giving power to the Board of directors to appoint additional directors—s. 260.

(26A) Authorizing managing agents to appoint directors—s. 261.

(27) Filling casual vacancies among directors—s. 262.

(28) Making provision for option to company to adopt proportional representation for the appointment of directors—s. 265.

(29) Requiring directors to hold a specified share qualification—ss. 270 and 283 (1) (a).

(30) In the case of a private company which is not a subsidiary of a public company making provision for disqualification or vacation of a director on grounds in addition to those specified in sub-s. (1) of s. 274 or sub-s. (1) of s. 283—s. 274 (3) and s. 283 (3).

(31) Providing for an age lower than 65 for the purpose of a director's duty to disclose his age under s. 282—s. 282 (1).

(32) Making provision for adjournment of a Board meeting for want of quorum—s. 288.

(33) Determining the remuneration of the directors and the managing director in accordance with the provisions of ss. 198 and 308—s. 309 (1).

(34) Making appointment of alternate directors—s. 313.

(35) Altering by special resolutions the memorandum so as to render unlimited the liability of the directors etc.—s. 323.

(36) Specifying suitable instalments in which the minimum remuneration would be payable under s. 198—s. 353, Proviso.

(37) Making restrictions on the powers of the managing agent—s. 368

(38) Making appointment of directors by the managing agent in accordance with s. 377 (1)—s. 377 (1).

(39) Making provision for distribution of property of the company on its winding up other than that contained in s. 511—s. 511.

In the items specified above the alternatives are :—

In item (12) —conditions of issue of the debentures, or contract.

In item (15) —in s. 170 (a) (b)—contract.

In item (22) —special resolution.

In item (33) —resolution of general meeting or special resolution.

In item (34) —resolution of general meeting.

In item (36) — do. do. do.

In item (37) —memorandum of association.

A managing agent must be appointed by virtue of the articles of association or the memorandum of association or an agreement with the companys.—s. 2 (25).

A managing director is to be appointed by virtue of the articles or the memorandum or a resolution of a general meeting or that by the Board of directors—s. 2 (26).

In case any of the foregoing powers are not to be found in the articles of association, powers may be taken by passing special resolution. But it is better to have them in the original articles.

50. As to articles of association generally see ss. 26 to 31 and notes thereto. A specimen of the articles of association of a company intended to be managed by managing agents and secretaries and treasurers and excluding Table A or some of its provisions is given in Forms 64 and 65 respectively in App. E. For the forms of articles of a company intended to be managed by the directors only, see Form 66 in App. E. and those of a private company intended to be managed by directors or the governing director respectively, see Forms 67 and 68 in App. E.

#### *Alteration of articles.*

51. Subject to the provisions of the Act and to the conditions contained in the memorandum of association, a company can, by special resolution, alter or add to its articles (s. 31). The only other limitations are that they must be altered in good faith and not to commit fraud on or to take an unfair advantage over a minority of shareholders. For other matters in connection with such alteration see notes to s. 31.

#### *Capital clauses in the articles.*

52. The share capital of a company limited by share formed after the commencement of the present Act or issued after such commencement shall be of two kinds only, namely, (a) equity share capital and preference share capital (s. 86). For definition of these two expressions, see s. 85. In future the capital clauses in the articles or the memorandum should be framed in accordance with the provisions of the above sections. For forms of such capital clauses, see Forms 69 to 72 which may be used with necessary modifications but keeping in mind the new provisions relating thereto in the present Act.

For a discussion as to the rights &c. of different classes of shareholders see Notes 185, 186 and 2093.

#### *Stamp.*

53. As to the stamp on the articles of association see App. F. The stamp must be affixed before the articles are signed.

### Consent and Qualification of Directors.

**54.** Every public company and every private company which is a subsidiary of a public company must have at least three directors [see s. 252 (1)]. Other private companies must have at least two directors [see s. 252 (2)]. The promoters should settle the number and qualification of the directors and approach suitable persons for their consent. If it is thought expedient to appoint directors by the articles, their consent in writing signed by themselves or by their respective agents authorized in writing should be obtained and see that it is filed with the Registrar. Where it is provided in the articles that a director must have certain number of qualification shares, he must either have subscribed for those shares in the memorandum of association or signed a contract to take from the company and pay for the qualification shares and must have filed the same with the Registrar or taken from the company and paid for or agreed to pay for his qualification shares or made and filed with the Registrar an affidavit to the effect that a number of shares not less than his qualification is registered in his name (see s. 266). This last provision makes it possible, it is apprehended, to acquire his qualification shares, if he can so secure it, without paying for them in cash. A list of persons who have thus consented to be directors of the company should also be prepared and filed with the Registrar [see s. 266 (4) and notes]. S. 266 does not however apply to a private company or a company which was a private company before becoming a public company [see sub-s. (5) of s. 266].

**55.** As regards restrictions on appointment or advertisement of directors, time within which their share qualifications are to be obtained and maximum amount thereof, filing of declaration of share qualification and penalties for default, see ss. 266, 270 and 271.

### Registration.

**56.** For registration of a company the following documents should be filed with the Registrar of Companies for the State in which the registered office is to be situate (see s. 33), namely :—

1. The memorandum and the articles of association (if articles are prepared).
2. The agreement, if any, with the company's managing agent or secretaries and treasurers.
3. Statutory declaration of an advocate of the Supreme Court or of High Court (for meaning of the High Court see N. 120), an attorney or a pleader entitled to appear before a High Court, a chartered accountant practising in India and engaged in the formation of a company, or of a director, manager or secretary of the company who has been named as such in the articles. As to the Form of such a declaration see Form No. 1 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956, printed as Appendix B.
4. Directors' consent under s. 266. See Form No. 29, *ibid*.
5. Agreement by directors to take qualification shares under s. 266, if the directors have not signed the memorandum for the number of qualification shares. See Form No. 31, *ibid*.
6. List of directors who have thus consented [s. 265 (4)]. See Form No. 30 *ibid*.

Along with these proper fees for registration (see Tenth Schedule of the Act) should be paid.

57. Upon registration the Registrar will give a certificate of incorporation and from the date of incorporation, as mentioned in the certificate, the subscribers and other persons, who subsequently become members, form a body corporate having an altogether separate existence, perpetual succession and a common seal (see s. 34 and notes thereto).

58. The memorandum and articles upon registration become a contract binding the company and the members, their heirs and legal representatives to observe all the provisions thereof (see s. 36 and notes thereto).

59. A member is entitled, on payment of one rupee to a copy of the memorandum and also of the articles, if articles are registered. The copy must be sent within 7 days of the request (see s. 39).

### **Situation of Registered office and Changes therein.**

60. S. 146 provides that a company must have a registered office as from the day on which it begins to carry on business or as from the 28th day after the date of incorporation whichever is the earlier, for a private company is entitled to commence business as soon as it is incorporated.

61. S. 146 also provides that in the case of all companies, including a private company, notice of the situation of the registered office and of any change therein must be given within 28 days after their incorporation, or of the change, to the Registrar (see Form No. 18 in App. B). As to the removal of the registered office, see Proviso to sub-s. (2) of s. 146. The inclusion in the annual return of the statement as to the address of the registered office will not satisfy the obligation imposed by s. 146. For the consequences of contravention of these provisions see sub-s. (4) of s. 146.

62. Where in pursuance of s. 157 a Company keeps a Foreign register of members, it shall within one month from the date of opening such register file with the registrar a notice of situation of the office where such register is kept and any change or discontinuance thereof [see s. 157 (2)].

### **Common Seal and Publication of Names etc.**

63. A company must get its common seal prepared in which its name is engraven in legible characters [s. 147 (1) (b)]. It is better to have one the impressions from which may be obtained by lever movement. For ordinary purposes, in addition, rubber stamps may be used, one containing the name of the company and others containing words and phrases in daily use of the company's transactions and correspondence, such as "For & on behalf of the .....Limited", "copied", "cancelled", "& Co." (for the purpose of crossing a cheque) &c., &c.

64. A company should also have its name displayed in a conspicuous position on the outside of every office as well as other places where its business is carried on, as provided in cl. (a) of s. 147 (1). It should further have its name mentioned (preferably printed) in legible charac-

ters in all bill-heads, letter paper, notices, advertisements and other official publications of the company, as well as on all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money and goods, bills of parcels, invoices, receipts and letters of credit etc. of the company [see s. 147 (1) (c)].

65. Where any notice, advertisement, &c. contain a statement of the authorized capital of the company they should show in equally prominent position and equally conspicuous characters the amount of capital which has been subscribed and the amount paid up (s. 148).

66. As to the proof of seal, power to affix it and the documents which require a seal see Notes 527, 528 and 302 and as to the form of affixing seal and that of the register of documents sealed see Forms 83 and 84 in App. E.

### Contracts.

67. Contracts which are required to be made in writing may be made on behalf of a company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied and discharged. Contracts which may be made by parol only may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged (see s. 46 and notes thereto). A bill of exchange, hundi or promissory note, if made, drawn, accepted or endorsed on behalf of a company by any person acting under its authority, express or implied, will bind the company, provided the company, by its constitution, has express or implied power to make, accept, indorse or issue bills of exchange, promissory notes and other negotiable instruments (see s. 47 and notes thereto). The directors or other officers who act for the company in these matters should take care that it is clearly expressed to be done for and on behalf of the company, otherwise they may find themselves personally liable (see notes to s. 47).

68. Every manager, managing agent, secretaries and treasurers or other agent of a company other than a private company, not being the subsidiary company of a public company, who enter into a contract for or on behalf of the company in which contract the company is an undisclosed principal must, at the time of entering into the contract, make a memorandum in writing of the terms of the contract and specify therein the person with whom it has been made. Every such person must immediately deliver the memorandum to the company to be filed and laid before the next Board meeting and send copies to each of the directors, otherwise the contract will be voidable at the company's option. See s. 416. As to the penalty for default see s. 416 (3) (b).

69. Ordinarily contracts on behalf of a company do not require to be made under its common seal which is made use of on special occasions such as sealing the share certificate, power of attorney, &c.

70. As to the execution of deeds at a place in or outside India and power for a company to have official seal for use abroad see ss. 48 and 50 respectively.

### Books and Accounts.

**71.** Every company must cause to be kept proper books of account with respect to (a) receipts and expenditures of money, (b) all sales and purchases of goods, and (c) the assets and liabilities of the company [sub-s. (1) of s. 209]. The books of account must be kept at the company's registered office or at such place in India as the directors think fit [s. 209 (1)]. They shall be open to inspection by the directors during the business hours [sub-s. (4)]. As regards the books of account of branch offices see sub-s. (2) of s. 209. For the consequence of default by persons mentioned in s. 209 (6) see sub-s. (5) of s. 209.

The following are some of the important books:—

The Journal.

Cash Book.

Petty Cash Book.

Ledger.

Fees Book.

Dividend Account Book.

In addition a company should keep the following books and registers:—

Index of members.

Register of Members.

„ „ contracts.

„ „ Debenture-holders.

„ „ Transfer of shares.

„ „ Transfer of debentures.

„ „ Mortgages and charges.

„ „ Documents.

„ „ Share-warrants.

„ „ Directors, Managers and Managing agents (see s. 303)

„ „ Securities.

„ „ Calls.

„ „ Letters received and despatched.

„ „ Shares (numerical).

„ „ Applications and Allotments.

„ „ Board Meetings.

Minute Book of Board Meetings.

Minute Book of General Meetings.

Share Certificate Book.

Seal Book.

Annual Summary of Capital Book.

Agenda Book.

Directors' Attendance Book.

Cable Book (in commercial companies).

Members' Address Book (in alphabetical order).

Specimen Signature Book (in alphabetical order); and such other books as the auditor of the company recommends.

### Statement by Banking and some other Companies.

**72.** A limited banking company, an insurance company, or a deposit, provident or benefit society, must, before it commences business and also on the first Mondays in February and August every year during which it carries on business, make a statement in the form given in Table F in Schedule I to the Act. A copy of the statement together with



a copy of the last audited balance-sheet laid before the members should be displayed and, until the display of the next following statement, kept displayed in a conspicuous place at the registered office of the company, and at every branch office or place where the business of the company is carried on. Every member and creditor of the company will be entitled to a copy of the statement on payment of a sum not exceeding 8 as. (See s. 223). As to the penalty for default in complying with the above requirements see s. 223 (4). As to the non-application of this section to life assurance companies or provident insurance society to which the Insurance Act IV of 1938 applies see sub-s. (5) of that section.

## Directors.

### *Constitution and number.*

73. Every private company which is not a subsidiary of a public company must have at least two directors; and every other company must have at least three directors. The directors collectively are called the "Board of directors" or "Board"—s. 252.

### *Increase and reduction in number of and additional directors.*

74. Subject to the provisions of ss. 252, 255 and 259 a company in general meeting may by ordinary resolution increase or reduce the number of directors within the limits fixed by the articles—s. 258.

75. In the case of a public company or a private company which is a subsidiary of a public company any increase in the number of its directors, *except in the cases mentioned in cls. (a) and (b) of s. 258*, shall require approval of the Central Government—s. 259. As to the form of application for this purpose, see Form No. 24 in App. B.

76. A company may by its articles appoint additional directors, provided that they hold office only up to the date of the next annual general meeting and that the number of directors and additional directors do not exceed the maximum strength fixed for the Board by the articles—s. 260.

### *Qualification and disqualification for appointment.*

77. In default and subject to any regulation in the articles, the subscribers of the memorandum who are individuals shall be deemed to be the directors until directors are appointed under s. 255—s. 254.

78. A body corporate, association or firm cannot be appointed a director. Only individuals can be so appointed—s. 253.

79. As to the conditions on which a person other than a retiring director can be appointed a director of a public company or a private company which is a subsidiary of a public company, see sub-s. (1) of s. 257.

80. As to the prohibition of certain persons connected with the managing agent of a public company or a private company which is subsidiary of a public company, except by special resolution, see s. 261.

81. A person who is not a retiring director cannot be appointed director of a public company or a private company which is subsidiary of a public company, unless he has, by himself or by his agent authorised in writing, signed and filed with the Registrar a consent in writing to act as such director—s. 264.

82. As to the disqualifications for appointment of a director see sub-s. (1) of s. 274. As to which of these disqualifications can be removed by the Central Government by notification in the Official Gazette, see sub-s. (2) of s. 274. A private company which is not subsidiary of a public company may by its articles provide any additional grounds—s. 274 (3).

### *Share Qualification.*

83. Where share qualification for the appointment of a director is required by the articles, he must obtain his qualification within two months after his appointment. For the purpose of this provision the bearer of a share warrant will not be deemed to be the holder of the shares specified in the warrant. Any provision in the articles requiring a director to hold the qualification shares before his appointment or to obtain them within a shorter time than two months after his appointment is void. The nominal value of the qualification shares shall not exceed five thousand rupees or the nominal value of one share where it exceeds five thousand rupees—s. 270.

84. As to the filing of declaration of share qualification with the company by a director, see s. 271.

85. As to the penalty for acting as a director after the expiry of the aforesaid two months see s. 272. The provisions of ss. 270 to 272 shall not apply to a private company unless it is a subsidiary of a public company—s. 273.

### *Appointment of directors.*

86. In the case of a public company or of a private company which is a subsidiary of a public company, two-thirds of the total number of directors must be appointed by the company in general meeting, and they shall be persons whose period of office is liable to determination by retirement of directors by rotation [s. 255 (1)]. The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not subsidiary of a public company, shall, in default of and subject to any regulation in its articles, also be appointed by the company in general meeting—s. 255 (2).

87. At a general meeting of a public company or of a private company which is a subsidiary of a public company, the appointment of directors must be voted on individually. For detailed provision see s. 263.

88. As to the option of a company to adopt proportional representation for the appointment of directors, see s. 265.

89. As to the restrictions on appointment by the articles or naming in a prospectus or statement in lieu of prospectus, of directors, see s. 266 which will not apply to—(a) a company not having a share capital, (b) a private company, (c) a prospectus issued after the expiry of one year from the date on which the company was entitled to commence business—s. 266 (5). The restrictions relate to the signing and filing with the Registrar a consent, and signing for and taking the qualification shares.

As to the procedure where a person other than a retiring director stands for appointment as a director, see s. 257.

*Retirement by rotation.*

90. In the case of a public company or a private company which is subsidiary of a public company at its first annual general meeting held next after the date of the general meeting at which the first directors were appointed in accordance with s. 255, and at every subsequent annual general meeting, one-third of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office [s. 256 (1)]. As to which of the directors are to retire by rotation, filling up the vacancy, etc. see sub-ss. (2) to (5) of s. 256.

*Filling of casual vacancies.*

91. As to the filling of casual vacancies of a public company or a private company which is a subsidiary of a public company by the Board of directors at a meeting of the Board, see s. 262 (1). Any person so appointed shall hold office only upto the date up to which the director in whose place he is appointed would have held office—s. 262 (2).

*Restrictions on Number of Directorships.*

92. After the commencement of the present Act no person shall, save as otherwise provided in s. 276, hold office at the same time of more than twenty companies—s. 275.

93. As to the choice to be made by a director of more than twenty companies at the commencement of this Act, see s. 276; and for the choice to be made by a person becoming director for more than twenty companies after the commencement of this Act, see s. 277.

94. As to the exclusion of directorships in certain companies for the purposes of ss. 275, 276 and 277, see s. 278.

95. For the penalty for holding office or acting as director of more than twenty companies in contravention of the foregoing sections, see s. 279.

*Retiring Age of Directors.*

96. Save as otherwise provided in s. 281 no person shall be capable of being appointed a director of a public company or of a private company which is a subsidiary of a public company, if he has attained the age of 65 years. Save as aforesaid a director of such a company must vacate his office at the conclusion of the annual general meeting commencing next after he attains the age of 65 years. But if a director who is in office at the commencement of this Act, his appointment will terminate at the conclusion of the third annual general meeting held after the commencement of this Act, if he had completed the age of 65 years before the commencement of the meeting [see s. 280 and also sub-s. (3) thereof].

97. The aforesaid age limit will not however apply to a director if his appointment is or was made or approved by a resolution in general meeting specifically declaring that the age limit shall not apply to him [s. 281 (1)]. As to the special notice of such a resolution and the notice to the company and the members stating the age of such director, see sub-ss. (2) and (3) of s. 281.

98. Any person who is appointed or to his knowledge is proposed to be appointed a director at a time when he has attained the age of 65 years or such lower age, if any, as may be specified in the articles, must give notice of his age to the company—s. 282. See in this connection the proviso to s. 282. For penalty see sub-ss. (2) and (3) of that section.

*Vacation of Office by Directors.*

99. For the grounds on which the office of a director shall be vacated, see s. 283.

100. A private company which is not a subsidiary of a public company may by its articles provide any additional grounds for vacation of office by directors—s. 283 (3).

*Removal of a Director.*

101. A company may, by ordinary resolution, remove a director before the expiry of his period of office [sub-s. (1) of s. 284]. This provision will not however authorise, in the case of a private company, the removal of a director holding office for life on 1st April, 1952; whether or not he is subject to retirement under an age limit by virtue of the articles or otherwise [see Proviso (1) to sub-s. (1) of s. 284]. The aforesaid provision shall not apply also to directors holding office under the principle of proportional representation mentioned in s. 265 [Proviso (2) to sub-s. (1) of s. 284].

102. As to the procedure for effecting the removal of a director or appointing somebody in his place, see sub-ss. (2) to (6) of s. 284. This section will not however deprive a person removed thereunder of any compensation payable to him in respect of the termination of his directorship, or derogate from any power to remove a director which may exist apart from the section—s. 284 (7).

*Compensation for Loss of Office.*

103. Payment of compensation for loss of office is not permissible except to managing directors or whole time directors or directors who are managers (see s. 318). As to the cases in which no such payment can be made see sub-s. (3) of s. 318. As to the amounts of compensation see sub-s. (4) of s. 318.

104. No director shall, in connection with the transfer of the whole or any part of any undertaking or property of the company, receive any compensation for loss of office (a) from such company, or (b) from the transferee or any other person, unless particulars of the payment proposed to be made by such transferee or person have been approved by the company in general meeting (see s. 319).

105. For the detailed provision regarding prohibition of payment to a director for loss of office etc. in connection with transfer of shares, see s. 320 and for provisions supplementary to ss. 318 to 320 see s. 321.

*Remuneration of Directors.*

106. The remuneration payable to the directors including the managing or whole time director shall be determined in accordance with the provisions of ss. 198 and 309, either by the articles or by a resolution

in general meeting or if the articles so require, by a special resolution—s. 309(1). For detailed provision, see s. 309.

107. An increase of such remuneration, in the case of a public company or a private company which is a subsidiary of a public company in any circumstances shall require the sanction of the Central Government—s. 310. As to the increase in remuneration of the managing or whole time director of such company or re-appointment or appointment after the Act requiring Government sanction, see s. 311. For the form of such an application, see Form No. 26 in App. B.

108. As to the overall maximum managerial remuneration and minimum managerial remuneration in the absence of inadequacy of profits, calculation of commission etc. in certain cases, and prohibition of tax-free payments, see ss. 198, 199 and 300.

#### *Loans to Directors, etc.*

109. No company shall, without obtaining the previous approval of the Central Government, make any loan to, or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by any director or other persons or bodies mentioned in cls. (a) to (e) of sub-s. (1) of s. 295. For exceptions see sub-s. (2) thereof and for detailed provisions see sub-ss. (3) to (6) of that section. As regards savings as to book-debts, see s. 296.

#### *Procedure, etc., where Director interested.*

110. Where a director is in any way concerned or interested in a contract or arrangement entered into or to be entered into by or on behalf of the company he must disclose the nature of his concern or interest at a Board meeting. For detailed provisions, see s. 299.

111. Such interested director cannot participate or vote in the proceedings of the Board. For details see s. 300. For penalty see sub-s. (4) of s. 300.

112. Every company is to keep a register of such contracts or arrangements in which shall be included particulars mentioned in cls. (a) to (e) of sub-s. (1) of s. 301. For details see sub-ss. (2), (3) and (5) thereof. As regards penalty see sub-s. (4) thereof.

113. As to the provisions relating to disclosure to members of a director's interest in a contract appointing manager, managing director, managing agents or secretaries and treasurers, see s. 302.

#### *Directors etc. with unlimited liability.*

114. In a limited company the liability of a director or the directors, managing agent, secretaries and treasurers or manager may be unlimited if so provided by the memorandum—s. 322(1). As to the proposal etc. in this behalf see sub-ss. (2) and (3) of s. 322.

115. A limited company may, if authorised by its articles, by special resolution render unlimited the liabilities of its directors etc. For details see s. 323.

#### *Miscellaneous Provisions.*

116. Any assignment of office made after the commencement of this Act, by any director shall be void—s. 312.

117. For the provisions for appointment of alternate directors and their terms of office, see s. 313.

118. Except with the previous consent by a special resolution, no director, relative or other persons mentioned in sub-s. (1) of s. 314 can hold any office or place of profit, except that of managing director, managing agent, secretaries and treasurers, manager, legal or technical adviser, banker or trustee for the holders of debentures of the company, (a) under the company or (b) under any subsidiary of the company unless the remuneration received from such subsidiary is paid over to the company or its holding company (see s. 314).

The provisions of this section should be complied with immediately.

## Board of Directors

### *Meetings.*

119. In the case of every company a meeting of its Board of directors must be held at least once in every 3 calendar months—s. 285. See in this connection sub-s. (1) of s. 288. Notice of such meeting must be given in writing to every director for the time being in India, and at his usual address in India to every other director—s. 286 (1). For penalty for default see s. 286 (2).

120. The quorum for such meeting shall be (a) one-third of the total strength of the Board (any fraction being rounded off as one) or (b) two directors, whichever is higher. For detail see s. 287.

121. As to the procedure where the meeting is adjourned for want of quorum, see s. 288.

122. As to the passing of resolutions by circulation, see s. 289. See in this connection s. 292.

### *Validity of Acts of Directors.*

123. Acts done by a person as a director shall be valid notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue any provision in the Act or in the articles. But such acts will not be valid after it has been shown to the company that his appointment was invalid or was terminated—s. 290.

### *Board's Powers and Restrictions thereon.*

124. The Board shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorised to do : (1) except those which are directed or required by this Act or any other Act or by the memorandum or articles to be exercised or done by the company in general meeting. In exercising any such power or doing any such act or thing the Board shall be subject to the provisions contained in this Act or any other Act or in the memorandum or articles or in any regulations not inconsistent therewith and duly made thereunder including regulations made by the company in general meeting, but no such regulation shall invalidate any prior act of the Board—s. 291.

**125.** For the powers or acts directed or required by this Act to be exercised or done by a company in general meeting see Note 1048 under s. 291.

**126.** The Board can exercise the following powers only by means of resolutions passed at meetings of the Board—(a) to make calls on shareholders in respect of money unpaid on their shares; (b) to issue debentures; (c) to borrow moneys otherwise than on debentures; (d) to invest the funds of the company; and (e) to make loans—s. 292.

**127.** The Board however may by a resolution passed at a meeting delegate to any committee of directors, the managing director etc. [mentioned in the Proviso to sub-s. (1) of s. 291] the powers specified in clauses (c), (d) and (e) to the extent specified in sub-ss. (2), (3) and (4) respectively of s. 292.

#### *Restrictions on powers of the Board.*

**128.** The Board of directors of a public company or of a private company which is a subsidiary of a public company shall not, except with the consent of such public company or subsidiary in general meeting exercise any of the powers mentioned in cls. (a) to (e) of sub-s. (1) of s. 293. For details see sub-ss. (2) to (5) of that section.

#### *Appointment of Sole Selling Agents.*

**129.** After the commencement of this Act the Board shall not appoint a sole selling agent for any area except subject to the approval of the company in general meeting [see sub-ss. (1) and (2) of s. 294].

**130.** As to the appointment of a sole selling agent for any area for a period of not less than five years which has been made before the commencement of this Act, see sub-s. (3) of s. 294.

#### *Board's sanction for certain contracts in which particular directors are interested.*

**131.** Except with the consent of the Board, a director or his relative, a firm in which such a director or partner is a partner, any other partner in such a firm, or a private company of which the director is a member or director, shall not enter into any contract with the company, (a) for sale, purchase or supply of any goods, materials or services or (b) after the commencement of this Act, for underwriting the subscription of any shares in or debentures of, the company. For detailed provision in this respect, see s. 297.

#### *Board's power to carry on business when managing agent or secretaries and treasurers are deemed to have vacated office, etc.*

**132.** Where the managing agent or secretaries and treasurers are deemed to have vacated or to have been suspended from office, or are removed or suspended from office, or cease to act or to be entitled to act as such, or where a permanent or temporary vacancy has otherwise occurred in their office, then the Board shall have power to carry on or arrange for the carrying on of the affairs of the company until the managing agent or secretaries and treasurers again become entitled to act as such, or until the company in general meeting resolve otherwise—s. 298.

**Register of Directors etc.**

133. Every company must keep at its registered office a register of its directors, managing director, managing agent, secretaries and treasurers, manager and secretary containing in respect of each of them the particulars mentioned in cls. (a) to (e) of sub-s. (1) of s. 303. See also Explanations (1) to (3) of that sub-section. The company shall also within the period mentioned in sub-s. (2) of s. 303 send to the Registrar a returns in the prescribed form [see Form No. 32 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956, printed as Appendix B] containing the particulars specified in the said register and notification of any change therein specifying the date of the change—s. 303 (2). For the form of alteration in the particulars of directors etc., see Form No. 33, *ibid.* As to the penalty for default see sub-s. (3) of s. 303.

134. For the provision for inspection of the said register see s. 304.

135. Every director etc. mentioned above of any other body corporate shall within 28 days of his appointment disclose to the company of the aforesaid particulars relating to the office in the other body corporate specified under sub-s. (1) of s. 303. In default he shall be punishable with fine which may extend to Rs. 500.—s. 305.

136. As to the duty of the Registrar to keep a separate register or registers containing the particulars required by him under s. 303 (2) and inspection thereof by any member of the public, see s. 306. For the form of such register of directors etc., see Form No. 34 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956, printed as Appendix B.

**Register of Directors' Shareholdings.**

137. Every company shall keep a register showing as respects, each director, the number, description and amount of any shares in or debentures of, the company or any other body corporate, being the company's subsidiary or holding company, or a subsidiary of the company's holding company, which are held by him, or in trust for him, or of which he has any right to become the holder whether on payment or not.—s. 307 (1).

138. As to what the register shall show, effect thereof, where to be kept, inspection thereof, Registrar's or Central Government's right to copy thereof, duty of producing the same at the commencement of every annual general meeting of the company, penalty and consequences of default, etc. see sub-ss. (2) to (10) of s. 307.

139. As to the duty of every director and every person deemed to be a director by virtue of sub-s. (10) of s. 307 to make disclosure of the aforesaid shareholdings, and penalty for default, see s. 308.

**Managing Directors, etc.**

140. For definition of "managing director", see s. 2 (26), and for the distinction between a managing director and a manager, see Note 60A.

141. In the case of a public company or a private company which is a subsidiary of a public company, it shall not, after the commencement



of this Act, appoint or employ, or continue the appointment or employment of persons as managing directors, mentioned in cls. (a) to (e) of sub-s. (1) of s. 267.

**142.** In the case of such a company an amendment of any provision relating to the appointment or re-appointment of a managing or whole time director or of a *director not liable to retirement by rotation* in the memorandum, articles or any resolution of the company or of its directors, shall not have any effect unless approved by the Central Government—s. 268. For form of such an application under s. 268 or s. 269 see Form No. 25 in App. B.

**143.** In the case of any company aforesaid the appointment of a managing or whole time director for the first time after the commencement of this Act in the case of an existing company, and after the expiry of three months from the date of incorporation in the case of any other company shall not have any effect unless approved by the Central Government—s. 269.

**144.** After the commencement of this Act no company shall appoint or employ any person as managing director, if he is either the managing director or manager of any other company—s. 316 (1). For exception see sub-s. (2) and its proviso and sub-s. (4) of s. 316.

**145.** Where at the commencement of this Act any person is a managing director or manager of more than two companies he must within one year from the said commencement make a choice as mentioned in sub-s. (3) of s. 316.

**146.** No company shall after the commencement of this Act, appoint or employ any individual as its managing director for a term exceeding five years at a time—s. 317 (1).

**147.** As regards the provision in respect of an individual holding the office of managing director at the commencement of this Act, and the re-appointment, re-employment or the extension of the term of his office, see sub-ss. (2) and (3) respectively of s. 317.

**148.** For definition of “manager,” see s. 2 (24) and Note 56. As to the distinction between “manager” and “managing agent” see Note 57 and that between “manager” and “managing director”, see Note 60A.

### **Managers.**

**149.** No company except a private company which is not a subsidiary of a public company shall after the commencement of this Act appoint or employ, or after the expiry of six months from such commencement continue the appointment or employment of any firm, body corporate or association as its manager—s. 384.

**150.** No company shall after the commencement of this Act, appoint or employ, or continue the appointment or employment of any person mentioned in cls. (a) to (c) of sub-s. (1) of s. 385. But the Central Government may, by notification in the Official Gazette, remove such disqualifications generally or in relation to any company or companies specified in the notification—s. 385 (2).

**151.** No public company or a private company which is subsidiary of a public company shall after the commencement of this Act,

appoint or employ any person as manager, if he is either the manager or managing director of any other company, except as provided in sub-s. (2) of s. 386—s. 386 (1). See sub-s. (3) of s. 386 for provision in the case of a manager or managing director holding office at the commencement of this Act, and the choice to be made by him. As to the Central Government's power see sub-s. (4) of this section.

**152.** As to the remuneration of a manager, see s. 387.

**153.** As to the application in the case of a manager, of s. 310 and s. 311 relating to increase of remuneration, of s. 317 regarding appointment for more than five years at a time and of s. 312 relating to the prohibition of assignment of office, see s. 388.

### **Managing Agents.**

*Prohibition of appointment of managing agent in certain cases.*

**154.** For definition of "managing agent", see s. 2 (25). For the distinction between managing agent and manager, see Notes 57 and 58.

**155.** By sub-s. (1) of s. 324 power has been given to the Central Government to notify in the Gazette that as from a specified date the provisions of sub-s. (2) thereof shall apply to all companies, whether incorporated before or after the commencement of this Act, which are engaged in specified classes of industry or business. Sub-s. (2) provides that thereupon,—where any such company has a managing agent his term of office shall, if it does not expire earlier, expire at the end of three years from the specified date or on 15th August, 1960, whichever is later, and the company shall not re-appoint or appoint the same or any other managing agent. In any other case the company shall not appoint a managing agent.

**156.** As to the laying before Parliament of the aforesaid rules and notifications, see sub-ss. (3) and (4) of s. 324.

**157.** After the commencement of this Act no company acting as the managing agent of any other company shall appoint a managing agent, and no company having a managing agent shall be appointed as managing agent of any other company. Any such managing agency shall expire at the latest on 15th August, 1956—see s. 325.

**158.** In respect of any company to which the prohibitions contained in s. 324 or 325 does not apply, a managing agent shall not be appointed or re-appointed except by the company in general meeting; and by the approval of the Central Government. The Central Government shall not accord its approval unless the conditions mentioned in cls. (a) to (c) of sub-s. (2) of s. 326 are fulfilled—see s. 326.

### *Term of Managing Agent's Office.*

**159.** After the commencement of this Act, no company shall, (a) where the company has had no managing agent since its formations, appoint a managing agent for a term exceeding 15 years, (b) in any other case, re-appoint or appoint a managing agent for a term exceeding 10 years at a time, and (c) re-appoint a managing agent for a fresh term where the existing term has 2 years or more to run, provided that the Central Government may permit the re-appointment at an earlier time.

For the meaning of "re-appointment" see sub-s. (2) of s. 328. The appointment or re-appointment of a managing agent in contravention sub-ss. (1) and (2) of s. 328 shall be void in respect of the entire term [sub-s. (3) of s. 328].

*Variation of Managing Agency Agreement.*

160. The managing agency agreement can be varied only by a resolution of the company in general meeting passed with the previous sanction of the Central Government—s. 329.

*Special provisions regarding existing managing agents.*

161. The term of office of existing managing agents shall, if it does not expire earlier, expire on 15th August, 1960, unless before that date he is re-appointed for a fresh term in accordance with any provision contained in this Act—s. 330.

162. As to the application of the Act to existing managing agents, see s. 331.

163. SS. 328 to 331 shall only apply to a public company, a private company which is a subsidiary of a public company and a private company which is not subsidiary of a public company unless the Central Government exempt the private company—s. 327.

*Restrictions on Number of Managing Agencies.*

164. After 15th August, 1960 no person shall at the same time hold office as managing agent on more than ten companies. For detailed provision in this regard, see s. 332. As to the penalty for contravention of this section, see sub-s. (5) thereof.

*Right of Managing Agent to charge on Company's Assets.*

165. A managing agent whose office stands terminated under s. 324 or s. 332 shall be entitled to a charge on the company's assets in respect of all moneys due to him or which he may have to pay in respect of any liability or obligation properly incurred by him, subject to all existing charges and incumbrances on such assets—see s. 333.

*Vacation of Office etc. by managing agent.*

166. Subject to the provisions of 340, the managing agent shall be deemed to have vacated his office on grounds mentioned in cls. (a) to (e) of s. 334.

167. The managing agent shall be deemed to have been suspended from his office, if a receiver is appointed for his property as provided in s. 335.

168. Subject to the provisions of ss. 340 and 341 the managing agent shall also be deemed to have vacated his office on the grounds mentioned in s. 336.

*Removal of Managing Agent.*

168 A. As to the removal of the managing agent for fraud or breach of trust, see s. 337, and for gross negligence or mismanagement, see s. 338.

In the latter case a special resolution will be required ; but in the former case an ordinary resolution of the company will suffice. Any two directors of the company will be entitled to call a general meeting for considering any resolution referred to in s. 337 or 338. For procedure see s. 339.

169. For the time when the disqualifications imposed by ss. 334 (a), 335 (1), 336 and by any resolution passed under cl. (ii) of s. 337, see sub-s. (1) of s. 340. As to the time when the Board may suspend the managing agent in cases referred to in sub-s. (1) of s. 340, see sub-s. (2) thereof.

170. A conviction will not however operate as disqualification if the convicted partner, director etc. of the managing agent's firm or company is expelled—see s. 341.

#### *Resignation and Transfer of Office by Managing Agent.*

171. As to the resignation by the managing agent and the procedure thereof see s. 342.

172. A transfer of office by the managing agent shall not take effect unless it is approved both by the company in general meeting and by the Central Government—s. 343.

#### *Succession to Managing Agency by Inheritance or Devise.*

173. Any agreement made by a company with its managing agent after the commencement of this Act shall be void so far as it provides for succession to the office by inheritance or devise (s. 344). In the cases of such agreement made before the commencement of this Act such succession will not be valid unless it is approved by the Central Government—s. 345.

#### *Changes in Constitution of Managing Agency Firm or Corporation.*

174. Changes in the constitution of the managing agency firm or corporation are to be approved by the Central Government. For meaning of a change in the constitution of a body corporate and for details see s. 346.

#### *Application of Schedule VIII to Certain Managing Agents.*

175. As to the application of Sch. VIII (which contains declarations to be made by firms, private companies and other bodies corporate acting as managing agents or secretaries and treasurers) to certain managing agents, see s. 347.

#### *Remuneration of Managing Agents.*

176. Save as otherwise expressly provided in this Act, no company shall pay to its managing agent in respect of any financial year beginning at or after the commencement of this Act, by way of remuneration, in any capacity (including that of the managing agent), any sum in excess of 10 per cent. of the net profits of the company for that financial year—s. 348.

177. As to how the net profits are to be determined, see s. 349. As to the ascertainment of depreciation, see s. 350.

**178.** For the special provision where there is a profit-sharing arrangement between two or more companies, see s. 351.

**179.** Additional remuneration may be paid to the managing agent if, and only if, such remuneration is sanctioned by a special resolution and is approved by the Central Government—s. 352.

**180.** As to the time of payment of the remuneration, see s. 353.

**181.** A managing agent shall not be entitled to an office allowance, but he will be entitled to be re-imbursed in respect expenses as provided in s. 354.

**182.** SS. 348 to 354 relating to remuneration of managing agents shall not apply to a private company, unless it is a subsidiary to a public company—s. 355.

*Appointment of Managing Agent or Associate as selling or buying agents for the company.*

**183.** No managing agent or his associate shall receive any commission or other remuneration in respect of sales of goods produced by the company, if the sales are made from any place in India [s. 356 (1)]. As to the appointment of the managing agent as selling agent for sales outside India, see sub-ss. (2) to (5) of s. 356.

**184.** For application of s. 356 to supply or rendering of any service by the company, see s. 357.

**185.** As regards the appointment and remuneration of the managing agent or his associate as buying agent for the company in or outside India, see s. 358.

**186.** As to the commission etc. of the managing agent as the buying or selling agent of other concerns, see s. 359.

**187.** A company may by special resolution approve of any contract with its managing agent or his associate (a) for the sale, purchase or supply of any property or for the supply or rendering of any service other than that of managing agent, and (b) for the underwriting of any shares or debentures to be issued or sold by the company—see s. 360.

**188.** All existing contracts relating to the matters referred to in ss. 356 to 360 between the company and the managing agent or his associate shall be deemed to terminate on 1st March, 1958 unless they terminate on an earlier date—s. 361.

**189.** Any remuneration received in contravention of ss. 348 to 354 and 356 to 361 shall be held in trust for the company—see s. 363.

**190.** As to the inspection of and taking of extracts from and copies of the registers referred to in ss. 356 to 360, see s. 362.

*Assignment of, or Charge on, Remuneration.*

**191.** Any assignment of, or charge on, his remuneration or any part thereof effected by a managing agent, shall be void as against the company—s. 364.

*Compensation for Termination of Managing Agent's Office.*

**192.** For the prohibition of payment of compensation for loss of office in certain cases, see s. 365; and for the limit thereof—see s. 366.

**193.** Other rights and liabilities of the managing agent or the company will not be affected on termination of the managing agent's office—see s. 367.

*Restrictions on Powers of Managing Agent.*

**194.** The powers of the managing agent appointed before or after the commencement of the present Act shall be exercised subject to the superintendence, control and direction of the Board of directors and to the provisions of the memorandum and articles as well as to the restrictions contained in Schedule VII—s. 368.

*Loans.*

**195.** No public company or a private company which is a subsidiary of a public company shall make any loan to or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by its managing agent or his associate, or to any body corporate specified in cl. (b) of sub-s. (1) of s. 369.—See that section. For exception regarding credit given for facilitating company's business, see sub-s. (2) of s. 369.

**196.** As regards prohibition of loans, etc. to companies under the same management, see s. 370. As to the penalty for contravention of ss. 369 and 370, see s. 371.

*Purchase by Company of Shares etc. of other Companies.*

**197.** For restrictions on and provisions relating to the purchase by a company of shares, or debentures of other companies in the same group, see s. 372. As to provisions relating to the investments made before the commencement of this Act, see s. 373; and as to penalty for contraventions of ss. 372 and 373 see s. 374.

*Managing Agent not to engage in Competing Business.*

**198.** A managing agent is not allowed to engage in a business competing with the business of the managed company. For detailed provision in this respect see s. 375.

*Condition Prohibiting Reconstruction or Amalgamation of Company except on Continuance of the Managing Agent, etc.*

**199.** Any provision in the memorandum, articles etc., whether made before or after the commencement of this Act, which prohibits the reconstruction of the company or amalgamation with any other body corporate except on the condition that such managing agent, etc. must be appointed or re-appointed in the reconstructed company or the body resulting from amalgamation shall become void with effect from the commencement of this Act—see s. 376.

*Restriction on Right of Managing Agent to appoint Directors.*

**200.** The managing agent may, if so authorised by the articles, appoint not more than two directors where the total number of directors exceeds five, and one director where the number does not exceed five. For detailed provision see s. 377.

### **Secretaries and Treasurers.**

**201.** For definition, see s. 2(44). For distinction between "manager" and "secretaries and treasurers", see Note 79E.

**202.** A company may appoint a firm or body corporate as its secretaries and treasurers: provided that no company shall, at the same time have both managing agent and secretaries and treasurers—s. 378.

**203.** Provisions of the Act applicable to managing agents will apply to the secretaries and treasurers, subject to the exceptions and modifications contained in cls. (a) and (b) of s. 379. SS. 324, 330 and 332 shall not however apply at all—s. 380. S. 348 shall apply subject to the modification contained in s. 381.

**204.** Secretaries and treasurers shall not have the right to appoint any director; and ss. 377 and 261 shall not apply in the manner in which the persons specified in s. 261 are connected or associated with the managing agents—s. 382.

**205.** Secretaries and treasurers will not be entitled, unless authorised by the Board of directors, to sell goods or articles produced by the company or to purchase, obtain or acquire machinery, stores, goods or materials for purposes of the company, or to sell the same when no longer required for those purposes—s. 383.

See notes to s. 378.

### **Managerial Remuneration, etc.**

**206.** For the overall managerial remuneration and the minimum managerial remuneration in the absence or inadequacy of profits, see s. 198.

**207.** As to the calculation of commission etc. payable to any officer or employee of the company other than a director, the managing agent, secretaries and treasurers or a manager, see the provisions of s. 199.

**208.** As regards prohibition of tax-free payments to any officer or employee of a company, see s. 200.

### **Avoidance of provisions relieving liability of officers and auditors of Company.**

**209.** Any provision in the articles, an agreement or any other instrument for exempting any officer or auditor of a company from, or indemnifying him against, any liability which by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, misfeasance, breach of duty or breach of trust shall be void—see s. 201.

### **Prevention of Management by Undesirable Persons.**

**210.** An undischarged insolvent will not be allowed to discharge the functions of directors etc. of a company, or to take part or to be concerned, in the promotion, formation or management of any company—(see s. 202). As to the penalty see that section.

**211.** As to the power of the Court to restrain fraudulent persons from managing companies and the procedure thereof, see the detailed provision of s. 203.

## **Restriction on Appointment of firms and Bodies Corporate to Offices.**

**212.** No company shall, after the commencement of this Act, appoint or employ any firm or body corporate to or in any office or place of profit under the company, other than the office of managing agent or secretaries and treasurers, for a term exceeding 5 years at a time. For exceptions and details see sub-ss. (2) to (6) of s. 204.

## **Prospectus.**

**213.** Great care and skill are required in drafting a prospectus by which capital is raised for the company. It should be attractive but at the same time it should not contain misrepresentation of any material fact or any deceptive, misleading or ambiguous statement. The prospectus must comply with the provisions of s. 56. For the matters to be stated and the report to be set out in a prospectus, see that section.

A skeleton prospectus is given in Form 88 in App. F. As to the applicants for shares see Forms 89 and 90 in App. E.

**214.** A prospectus is to be dated and that date shall be taken as the date of publication thereof s. 55. This is to be signed by the directors etc. and filed with the Registrar for registration *on or before the date of its publication*, see s. 60. If a prospectus is issued without such a copy being so filed, the persons who are parties to the prospectus shall be liable to a heavy penalty [see s. 60 (5)]. As to the penalties for issuing a prospectus in contravention of s. 57 or 58 relating to the expert's consent, see s. 59.

**215.** Where a prospectus invites persons to subscribe for shares in or debentures of the company, a director, promoter or any other person who has authorised the issue of the prospectus will be liable for any misleading or untrue statement therein to all persons for compensation or damages who subscribe for the shares or debentures *on the faith of the prospectus* (see s. 62 and notes thereto). As to the criminal liability for misstatement in a prospectus, see s. s. 63.

**216.** Terms of contract mentioned in a prospectus or statement in lieu of prospectus are not to be varied (s. 61).

**217.** Where there is a misrepresentation or concealment of a material fact in a prospectus the following remedies are open to the allottee : (1) rescission of the contract to take shares ; (2) defence taken in an action for call ; (3) rectification of the register of members ; (4) damages in an action of deceit ; (5) damages under s. 62 ; and (6) criminal proceedings.

**218.** It sometimes happens that a company allots its shares or debentures to somebody with a view that the whole or part of those shares or debentures may subsequently be offered for sale to the public. It has been provided in s. 64 that any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and as such must comply with all the provisions relating to a prospectus issued by the company. It will be presumed that an allotment or agreement to allot shares and debentures



tures was made with a view to those being offered for sale to the public, if it is shown (a) that an offer of the shares or debentures or any of them for sale to the public was made within 6 months after the allotment or agreement to allot or, (b) that on the date when the offer was made the whole of the consideration to be received by the company in respect of them had not been so received.

**219.** As to the construction of references to offering shares or debentures to the public, etc., see s. 67.

**220.** In the case of newspaper advertisements of prospectus, it will not be necessary to specify therein the contents etc. of the memorandum (s. 66).

**221.** As to the penalty for fraudulently inducing persons to invest money in shares or debentures of a company, see s. 68.

### **Statement in Lieu of Prospectus.**

**222.** A company, not being a private company, which does not issue a prospectus or which has issued a prospectus but has not proceeded to allot any of the shares offered to the public subscription must not allot any of its shares or debentures before it has filed with the Registrar a statement in lieu of prospectus giving most of the particulars required to be given in a prospectus, in the form given Schedule III of the Act (s. 70). The statement is to be signed, as in the case of a prospectus, by every person who is named therein as a director or a proposed director or by his agent authorized in writing (s. 70). For detailed provision and penalties, see s. 70.

**223.** The terms of any contract referred to in the statement in lieu of prospectus cannot be varied except with the approval of the company in general meeting (s. 61).

### **Prospectus offering Debentures for Subscription.**

**224.** The word "prospectus" means any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription any shares or debentures of a company [s. 2 (36)]. So when a prospectus is sought to be issued offering debentures for subscription, the prospectus thereof should comply with the requirements of ss. 55 *et seq.*

For forms of such a prospectus, application, allotment and transfer of debentures and the debenture itself see Forms 137, 138, 139, 140 and 141 respectively in App. E.

### **Underwriting.**

**225.** For avoiding or minimising the risk of failure of an issue of shares or debentures of a company it is usual to make arrangement for underwriting them before issuing the prospectus. No allotment of shares can be made unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide for matters specified in cl. 5 of Sch. II has been subscribed and the application money (not less than 5 p.c. of the amount of the share) received by the company in cash or by cheque within 120 days after the first issue of the prospectus. In such

a case all moneys received from applicants for shares shall have to be returned within 130 days after the issue of the prospectus (s. 69).

226. The underwriter writes a letter to the promoters or directors of the company agreeing to underwrite a specified amount of the issue on the footing that he is only bound to take up his retable proportion of what the public does not subscribe (see Forms 85 and 86 in App E). An underwriter usually procures sub-underwriters on similar conditions (for sub-underwriting letter see Form 87 in App. E). An underwriting letter, when accepted, ripens into a contract. As to what "underwriting" is and the obligations of an underwriter, see Note 478.

*Payment of Commission and Brokerage and Issue of Shares at Discount.*

227. The responsibilities of an underwriter are undertaken in consideration of a commission the payment of which must have been authorized by the articles and disclosed in the prospectus (s. 76). Provision has been made in s. 79 for issuing at a discount shares of a class already issued provided that (i) such issue is authorized by a resolution of the company and is sanctioned by the Court; (ii) the resolution specifies the maximum rate of discount not exceeding 10 p.c. or such higher rate as the Central Government may permit in any special case; (iii) not less than 1 year must at the date of issue have elapsed since the date on which the company was entitled to commence business; and (iv) such shares are issued within 2 months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow. Every prospectus relating to the issue of such shares and every balance-sheet issued after the issue of the shares must contain the particulars of the discount or so much thereof as has not been written off. For the consequences of default of this latter provision see the second para of sub-s. (4) of s. 79.

228. Save as aforesaid, the payment of a commission or discount on a share is illegal [see s. 76 (2) and notes].

229. If a commission for subscription of its shares is paid by a company not issuing a prospectus, it must be disclosed in the statement in lieu of prospectus or in a statement in the prescribed form and filed with the Registrar, and where a circular or notice, not being a prospectus, is issued, the commission must also be disclosed therein [s. 76 (1)(iii)].

As to the form of statement of the amount or rate per cent. of the commission payable in respect of shares or debentures etc., see Form No. 4 in Appendix B.

*Issue of Shares at Premium.*

230. Where a company issues shares at a premium, the aggregate amount thereof must be transferred to "the share premium account" which for reduction of capital shall be regarded as paid up share capital of the company [s. 78 (1)]. As to the application of the share premium account, see sub-ss. (2) and (3) of s. 78.

*Issue of redeemable preference shares.*

231. Provision has been made in s. 80 for issuing redeemable preference shares, if so authorized by the articles, in the case of companies limited by shares. Subject to the provisions of clauses (a) to (d) of sub-s.

(1) of s. 80 these shares may be redeemed by the company. As regards re-issue of these redeemed shares and other provisions relating to the same see sub-ss. (4) and (5) of this section.

232. As to the penalty for contravention of s. 80, see sub-s. (6) thereof.

### **Payment of Interest out of Capital.**

233. Payment of interest or dividend out of capital is illegal. But where any shares are issued to defray the expenses of the construction of any works or building or the provision of any plant which cannot be made profitable for a long period, the company may pay interest at a rate not exceeding 4 per cent. per annum (or at such other rate as the Central Government may direct by notification in the Official Gazette) on so much of that share capital as is for the time being paid up, subject to the conditions and restrictions mentioned in s. 208.

### **Applications for Shares.**

234. It is not lawful to issue any form of application for shares or debentures unless the form is issued with a prospectus which complies with the requirements of s. 56 [see sub-s. (3) of s. 56].

235. Applications for shares with deposits (which should be not less than 5 per cent. of the amount of the share) may be received direct by the company or through a bank or banks with which previous arrangements have been made. For forms of such applications, see Forms 89 and 90 in App. E. Where a bank receives the applications, it daily sends them with a list to the company entering the amounts received on the company's pass-book which is from time to time checked with the applications. When it is seen that the amount of the minimum subscription as stated in the articles and the prospectus or the statement in lieu of prospectus has been received, the company proceeds to allotment.

### *Allotment of shares.*

236. In sub-s. (1) of s. 69 it has been laid down that no allotment shall be made of any share capital offered for public subscription unless the amount stated in the prospectus as the *minimum amount* which in the opinion of the Board of directors must be raised in order to provide for the matters specified in cl. 5 of Sch. II has been subscribed and the application money has been received in cash or by cheque or by other instrument which has been paid. The amount so stated in the prospectus as the minimum subscription will be reckoned exclusive of any amount payable otherwise than in cash and at least 5 per cent. thereof must have been received in cash by the company before going to allotment.

237. If the aforesaid conditions are not fulfilled within 120 days after the first issue of prospectus, all moneys received from the applicants of shares must be repaid within 130 days after the issue of the prospectus, otherwise the directors will be jointly and severally liable to repay that money with interest at 6 per cent. per annum [sub-s. (5) of s. 69]. Until such repayment or until the certificate for commencement of business is obtained, the money should be kept deposited in one of

the scheduled banks [see sub-s. (4) of s. 69]. For the consequences of contravention of the last provision see the second para of sub-s. (4) of s. 69.

238. An allotment made in contravention of s. 69 will be voidable at the instance of the applicant within two months after the statutory meeting, or where the company is not required to hold a statutory meeting as in the case of a private company or where the allotment is made after the holding of the statutory meeting, within two months after the date of the allotment *and not later*, and will be voidable notwithstanding the company is in course of being wound up [see s. 71]. For the notice avoiding the allotment see Form 98 in App. E.

239. By the articles shares are generally placed at the disposal of the directors, the managing director or the managing agents. Where the power of allotment is vested in the directors, the secretary places the applications before the board meetings from time to time and resolutions for allotment are passed. Thereupon the secretary issues allotment letters (see Form 92 in App. E) entering the necessary particulars in the Application and Allotment Book (see Form 104 in App. E). The application on which allotment cannot be made owing to over-subscription of the issue or any other cause should be returned to the applicant with a letter of regret and a payment order for return of the deposit money (see Form 91 in App. E). For the forms of letters of allotment of preference shares and fully paid shares see Forms 93 and 94 in App. E.

240. As to the prohibition of allotment in certain cases unless statement in lieu of prospectus is delivered to the Registrar, see s. 70 and under the heading "Statement in lieu of Prospectus", *supra*.

241. No allotment of shares or debentures shall be made in pursuance of a prospectus and no proceedings shall be taken on applications in pursuance thereof, until the beginning of the 5th day after that on which the prospectus is first so issued, which is called "the time of the opening of the subscription lists". For detailed provision see s. 72.

242. For the provisions regarding allotment of shares and debentures to be dealt with on stock exchange see s. 73; and as to the manner of reckoning 5th days etc. in ss. 72 and 73, see s. 74.

#### *Return of allotment.*

243. After allotment the company should within one month file with the Registrar a return of allotment complying with the provisions of s. 75.

As to the form, see Form No. 2 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956, printed as Appendix B. As to the form of particulars of contracts relating to fully paid up or partly paid up shares to be filed along with the return, see Form No. 3, *ibid*.

244. In sub-s. (3) of s. 75 the Registrar has been given power to extend the aforesaid period of one month. As to the consequence of default in complying with the provisions of s. 75, see sub-s. (4) thereof.

245. Nothing in s. 75 shall apply to the issue and allotment of shares forfeited for non-payment of calls [s. 75 (5)].

**246.** The return of allotment is generally filed once a month taking care that all allotments made within the month are included therein.

### **Commencement of Business.**

**247.** A public company cannot commence business or exercise any borrowing power unless and until it gets the requisite certificate from the Registrar of Companies (s. 149). To obtain this the company must comply with the provisions of s. 149.

For the form of declaration of compliance with sub-s. (1) (a), (b) and (c) of s. 149, see Form No. 19 in Appendix B, and for the form of declaration of compliance with sub-s. (2) (b) of s. 149, see Form No. 20, *ibid.*

**248.** All contracts made by the company before the date on which it is entitled to commence business are provisional only and not binding on the company until such date [see s. 149 (4) and notes thereto]. For consequences of commencing business or exercising borrowing powers in contravention of s. 149 see sub-s. (6) thereof.

**249.** S. 149 however does not apply to a private company or to a company registered before the commencement of Act VII of 1913 (*i.e.*, 1st April, 1914) which has not issued a prospectus [s. 149 (7)]. The provisions of s. 149, in so far as they do not relate to shares apply to a company limited by guarantee and not having a share capital [s. 149 (8)].

### **Register of Members.**

**250.** As soon as a company is registered, the secretary should commence writing up the register of members beginning with the names of the subscribers to the memorandum, and where the allotments are made he should enter therein the names of the allottees and other necessary particulars. For these particulars and penalty for default see s. 150. As to the method of keeping the register see s. 150 and notes thereto. In large companies another book called the "share ledger" is used in which an account is kept of the shares of the particular members. Ordinarily one book will suffice and Form 105 in App. E for the purpose is recommended.

**251.** It has been provided in s. 151 that every company having more than 50 members must keep an index of the names of members and must within 14 days after any alteration is made in the register of members make the necessary alteration in the index. The index may be in the form of a card index and must contain a sufficient indication to enable the account of any member to be readily found. The index must, at all times, be kept at the same place as the register of members [s. 151 (3)]. For the consequences of default in keeping the index see sub-s. (4) of s. 151.

**252.** Every company shall also keep a register and index of debenture-holders. For detailed provision in this respect, see s. 152.

**253.** It should be remembered that no notice of any trust, expressed, implied or constructive shall be entered on the register of members or of debenture-holders nor will the Registrar of Companies receive any such notice (see s. 153 and notes thereto).

254. For the provisions relating to the keeping of a branch register outside India, called the "foreign register" see ss. 157 and 158.

256. The register of members is *prima facie* evidence of matters directed or authorized by the Act to be entered therein (see s. 164 and notes).

### **Closing of Register of Members or Debenture-holders.**

257. A company may, by complying with the provisions of s. 154 (1) close its register of members or debenture-holders for a period not exceeding 45 days in each year, but not exceeding 30 days at any one time. As to the penalty see sub-s. (2) of s. 154.

#### *Rectification of the register of members.*

258. Where a person has been induced to take shares by fraud or misrepresentation and where a person has ceased to be a member by transfer or otherwise and his name is kept on the register of members inspite of representation on his part, he may apply to the Court for rectification of the register. Similarly where a person has got a right to be on the register by taking transfer of shares or otherwise and the company refuses or makes unnecessary delay to place his name on the register of members, he can make such an application (see s. 155 and notes thereto). As to the directors' power to rectify the register without intervention of the Court see N. 727.

For detailed provisions see s. 155.

259. When the Court makes an order for rectification of the register of members, it directs notice of the rectification to be filed with the Registrar within 14 days from the date of the making of the order (see s. 156).

As to the Form of such notice, see Form No. 21 in Appendix B.

#### *Inspection &c. of the register of members.*

260. The register of members commencing from the date of the registration of the company, the index of members, the register and index of debenture-holders and all annual returns prepared under ss. 159 and 160 together with the copies of the certificates and documents required to be annexed thereto under ss. 160 and 161 should be kept at its registered office (see s. 163). They may be inspected by the members or debenture-holders *gratis* and by any other person on payment of one rupee for each inspection during the business hours; any member or other person may also make extracts therefrom without fee or additional fee [see s. 163]; and the company must cause any copy so required by such persons to be sent to them within 10 days from the date of the requisition [see sub-s. (4) of s. 163]. As to the penalty for default see sub-s. (5) of s. 163. In case of default the Court may by order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them [see sub-s. (6) of s. 163].

### **Annual Returns.**

261. Every company having a share capital, must, within 42 days from the date of holding the annual general meeting referred to in s. 166

file with the Registrar a return containing particulars specified in Schedule V regarding matters mentioned in cls. (a) to (g) of sub-s. (1) of s. 159. For details see that section.

**262.** As to the provision for such annual return by a company not having a share capital, see s. 160.

**263.** For further provisions regarding the annual return and certificate to be annexed thereto, see s. 161.

**264.** As to the penalty and interpretation, see s. 162.

### **Share Certificates and Stock Certificates.**

**265.** From the application and allotment book and the register of members the secretary should take materials for writing up the certificates of shares and stocks (see Forms 96 and 97 in App. E). These should be signed and sealed in accordance with the provisions therefor in the articles of association and kept ready for delivery within three months after the allotment or transfer (s. 113). As soon as the share certificates are ready a notice to that effect (see Form 95 in App. E) should be sent to the shareholders whose certificates are thus ready. For penalty for default see s. 113 (2). For making good the default, see sub-s. (3) of s. 113.

**266.** A statement as to the company's lien on the shares should not be entered on the share certificate (see notes to s. 113). For other matters relating to the share certificate see notes to ss. 84 and 113. As to the "lien" clause in the articles see reg. 9, Table A and for waiver, priority and effect of assignment or death see notes to reg. 9.

**267.** If a share certificate is defaced, lost or destroyed, it may be renewed by the company in accordance with the provisions thereof in the articles (see reg. 8 of Table A) upon furnishing the requisite evidence and indemnity bond (see Form 100, in App. E). Before issuing a fresh certificate advertisement in a newspaper should be made in Form 99, in App. E.

**268.** Where shares are converted into stock, share certificates should be called in and stock certificates issued in lieu thereof. For form of stock certificate see Form 97 in App. E.

### **Calls.**

**269.** Calls are to be made by the directors only [see s. 292 (1) (a)]. The amount and interval should tally with those mentioned in the prospectus and articles. For notice of call to be sent to the shareholders see Form 101 in App. E. A register of calls should be kept in a form similar to Form 105 in App. E. Provisions are generally made in the articles for interest at certain rates payable to the company for failure to pay call on the due date. For other informations in connection with this matter see notes to regs. 13 and 15 of Table A.

**270.** Calls on shares of the same class are to be made on a uniform basis (see s. 91). A company may accept unpaid share capital, although not called up—s. 92.

### Forfeiture.

271. Provisions are generally made in the articles for forfeiture of shares for non-payment of call money (see regs. 29 to 35 of Table A). Where the articles provide that a person whose shares have been forfeited shall, notwithstanding the forfeiture, remain liable to pay the call money with interest (see reg. 33 of Table A), such a provision is enforceable.

272. The regulations contained in the articles for forfeiture should be strictly followed, otherwise the Court may declare the forfeiture invalid. As to the notice of forfeiture see Form 103 in App. E. S. 75 regarding return of allotments does not apply to the issue and allotment of forfeited shares [see sub-s. (5) of that section].

273. For other matters relating to forfeiture of shares see regs. 29 to 35 of Table A and notes thereto.

### Share Capital.

274. Shares in a company are movable property, transferable in the manner provided by the articles—s. 82. Each share shall be distinguished by its appropriate number—s. 83.

#### *Kinds of Share Capital.*

275. Shares issued after the commencement of this Act shall be of two kinds only, namely, "preference share capital," and "equity share capital" (s. 85). As to their meaning and those of "preference shares" and "equity shares", see s. 85.

#### *Voting Rights.*

276. As to the voting rights of the holders of the aforesaid shares, see s. 87. Issue of shares with disproportionate voting rights has been prohibited by s. 88. As to the termination of disproportionately excessive voting rights in the existing companies, see s. 89.

277. The provisions of ss. 85 to 89 will not (a) in the case of shares issued before the commencement of this Act, affect any voting rights attached to the shares save as otherwise provided in s. 89, or any right attached to the shares as to dividend, capital or otherwise, or (b) apply to a private company, unless it is a subsidiary of a public company—s. 90.

#### *Alteration of Share Capital.*

278. A company having a share capital may, if so authorized by its articles, (a) increase its share capital by the issue of new shares, (b) consolidate and divide all or any of its shares into those of larger amounts; (c) convert all or any of its *paid up* shares into stock and re-convert that stock into paid up shares of any denomination; (d) sub-divide its shares or any of them into shares of smaller amounts; and (e) cancel shares which have not been taken or agreed to be taken (s. 94). Such a cancellation of shares is not a reduction of share capital within the meaning of the Act [s. 94 (3)]. These powers must be exercised by the company in general meeting and will not be required to be confirmed by the Court [sub-s. (2) of s. 94] and the company must file within 1 month



with the Registrar notice of the exercise of any powers of sub-division, cancellation etc. of shares (see s. 95). For form of such notice see Form No. 5 in App. B.

**279.** If the articles do not contain the requisite powers they may be taken by passing "special resolution" (see ss. 31 and 189 and notes to those sections).

**280.** An unlimited company may by its resolution for registration as limited company, increase its share capital and/or provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event of the company being wound up—s. 98.

**281.** As to the provision for reserve liability of a limited company, see s. 99.

(a) *Increase of Share Capital.*

**282.** In increasing the share capital the provisions in the articles, or if there is no such provision, those in the resolution authorizing the increase, should be followed. An ordinary resolution will do. Formerly the company might empower the directors to make the increase but since 1937 a resolution of the general meeting has been necessary. See sub-s. (2) of s. 94.

**283.** Where the company decides to increase the capital by the issue of further shares, they must be offered in the first instance to the members in proportion to the existing "equity" shares held by each member and such offer is to be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer, if not accepted, will be deemed to be declined (see s. 81 and notes thereto). For meaning of "equity shares" see s. 85.

**284.** Where a company having a share capital consisting of shares or stock has increased the same beyond the registered capital and where a company not having a share capital has increased the number of its members beyond the registered number, it must file with the Registrar within fifteen days of the date of the resolution a notice of the increase (see s. 97). For form see Form No. 6 in App. B. The notice must include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued [see the new sub-s. (2) of s. 97]. As to the penalty for omission to file the notice see sub-s. (3) of s. 97.

As to the form of notice of increase in number of members under s. 97, see Form No. 7 in Appendix B.

(b) *Consolidation of shares.*

**285.** The observations made above in the case of increase of share capital apply generally as to the mode in which the shares may be consolidated and divided into shares of larger amount.

(c) *Conversion of shares into stock and re-conversion.*

**286.** It should be noted that only paid up shares can be converted into stock. If anything remains unpaid on the shares, such shares cannot be converted into stock. For distinction between "shares" and "stock" and the convenience of stock see notes to s. 84 and s. 95.

**287.** A company cannot issue stock directly. For the form of stock certificate see Form 97 in App. E.

**288.** The mode of converting shares into stock or reconversion is the same as in the case of an increase of share capital.

**289.** Where the share capital has been converted into stock, the provisions of the Act which are applicable to shares only will cease to apply in respect of the shares thus converted ; (see s. 96).

*(d) Sub-division of shares.*

**290.** A company may sub-divide its shares or any of them into shares of smaller amount, provided that in the sub-division the proportion between the amount paid and the amount unpaid on each reduced share be the same as it was in the case of the shares from which the reduced share is derived [s. 94 (1) (d)].

**291.** In the case of sub-division of shares the provision for notice to the Registrar is similar to that in the case of increase of capital (see s. 95).

*(e) Cancellation of shares.*

**292.** A cancellation of shares made under s. 94 (1) (e) is not a reduction of capital [s. 94 (3)]. In this way that portion of the authorized capital which has not been taken or agreed to be taken may be diminished. But where the subscribed capital (whether the shares are paid up in part or whole) is sought to be reduced, strong safeguards have been provided in the Act (see ss. 100 *et seq.*).

### Re-organization of Share Capital.

**293.** Formerly a re-organization of share capital could be made by complying with the provisions of s. 54 of the old Act of 1913. That section was repealed by Act XVII of 1942. All re-organizations of share capital can now be effected by following the provisions of s. 391 *et seq.*

*Variation of shareholders' rights.*

**294.** It has been provided by s. 106 that in the case of a company the share capital of which is divided into different classes of shares, provision may be made by the memorandum or articles for authorising the variation of rights attached to any of the classes of shares subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares and supported by the votes of the holders of any specified proportion, not being less than three-fourths, of those shares. If in pursuance of the said provision the rights attached to any class of shares are varied, then the holders of not less in the aggregate than 10 per cent. of the issued shares of that class, being persons who did not consent to vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Court [see s. 107 (1)]. As regards the procedure for the making and hearing of such application see sub-ss. (2) of s. 107.

**295.** The company must, within 15 days after service on it the order of the Court, forward a copy of the order to the Registrar; and for the consequence of default see sub-s. (5) of s. 107.

### **Reduction of Share Capital.**

**296.** S. 77 provides that no limited company shall have power to buy its own shares. But it can effect a reduction of capital by complying with the provisions of sections 100 *et seq.* If the power to reduce is contained in the articles, it can at once proceed to pass the necessary special resolution for reduction; but if not, the company must first take the necessary power by altering the articles under s. 31, that is, by passing "special resolution" (see s. 189 and notes thereto).

**297.** Sub-s. (2) of s. 77 provides that no public company and no private company which is a subsidiary of a public company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of any shares in the company or in its holding company. For the consequences of contravention of these provisions see sub-s. (4) of s. 77. These restrictions will not however apply to a private company not being a subsidiary company of a public company. For further exceptions see the Proviso to sub-s. (2) and sub-ss. (3) and (5) of s. 77.

**298.** The company can by complying with ss. 100 *et seq.* extinguish or reduce the liability on any of its shares not paid up. As for instance, where Rs. 5 only has been paid on each of the shares of Rs. 10, the company can extinguish the further liability of Rs. 5 per share by reducing the Rs. 10 shares to Rs. 5 shares.

**299.** Where capital has been lost or is unrepresented by available assets, the company can cancel a portion of its paid up share capital. As for instance, where the company's share capital is one lac of rupees divided into 1,000 shares of Rs. 100 each all paid up and has lost Rs. 25,000 in its business which is not represented by any available assets, it can write off that amount from its share capital and make each share one of Rs. 75 fully paid.

**300.** Where the paid-up capital is in excess of the requirements of the company, it can return the excess amount to the shareholders. As for example, where the capital is Rs. 1,00,000 divided into 1,000 shares of Rs. 100 each all paid up, if the company does not require more than Rs. 50,000 for its purposes, it may return Rs. 50 per share to the shareholders and make the shares of Rs. 50 each fully paid up. In such a case the capital may be returned also on the footing that it may be called up again when the company may think it necessary.

**301.** In all these cases the return should be an all round one, that is, the reduction should be made in respect of each share in the same proportion. But in a proper case the Court can confirm any kind of reduction notwithstanding that it affects the rights of a particular class of shareholders. See notes to s. 100.

**302.** As to the procedure, see ss. 101 *et seq.*

**303.** Where the Court makes an order confirming the reduction it may make an order that the company must add to its name the words "and reduced" until such date as the Court directs [s. 102 (2) and (3)]. As to the registration of the Court's order and minute of reduction see s. 103. See in this connection sub-ss. (2) to (6) of s. 103.

**304.** A company limited by guarantee may, if it has a share capital and is so authorized by its articles, increase or reduce its share capital in the same manner—see s. 94.

### **Reserve Liability.**

**305.** A limited company may by "special resolution" determine that the uncalled portion of its capital shall not be called up except in the event and for the purposes of winding up (s. 99). As to the power of an unlimited company to provide for reserve share capital on re-registration, see s. 98.

### **Transfer of Shares and Debentures.**

**306.** Shares and debentures are transferable subject only to the restrictions that may be imposed by the articles. For discussion as to the right of transfer and the directors' powers to refuse registration thereof see Notes 499, 500 and notes to reg. 19 of Table A. As to how transfers are effected, effects of non-compliance with the rules, effects of registration, forged transfers, certification and estoppel, transfer in blank, priority of title, purchase at Court sale &c. see notes to s. 82 and reg. 19 of Table A.

**307.** Unless a particular form is prescribed in the articles, the transfer may be effected by any usual or common form (see reg. 20 of Table A). But it is *required* that the instrument of transfer is to be executed both by the transferor and the transferee (see s. 108). For form of transfer see reg. 20 of Table A and Form 114 in App. E. The instrument of transfer together with the certificate of shares transferred is sent to the company, upon which the secretary gives a receipt (see Form 115 in App. E). If all the shares mentioned in the share certificate are transferred, an endorsement is generally made on the back of the share certificate to the effect that the shares are transferred to the transferee and the share certificate is returned to the latter. But where some of the shares only are transferred a "balance receipt" (see Form 116 in App. E) is given and two new share certificates are prepared—one is given to the transferor for the shares retained by him and the other to the transferee for the shares transferred to him.

**308.** When an instrument of transfer together with the share certificate is received in the company's office, the secretary should send a notice (see Form 117 in App. E) to the transferor to his registered address. But even this does not protect the company if the transfer is found to be forged (see N. 510). So it is the duty of the secretary to compare the signature of the transferor with his admitted signature kept in the office. For this purpose signatures of all members should be called for and kept in a separate book in alphabetical order.

**309.** If the secretary does not hear from the transferor within a reasonable time or a communication admitting the transfer is received,

the former places the transfer before the directors or other authority prescribed in the articles for orders for registration of the transfer, and this should be recorded in the register of transfers of shares (see Form 118 in App. E). The consequent changes in the register of members are also to be made, and a new folio should be opened in the name of the transferee.

**310.** After all this has been done, the transferee's name should be endorsed on the back of the share certificate or, if necessary, a new share certificate or certificates should be prepared taking care that the original certificate is cancelled and destroyed. For, if any one can get hold of the original certificate and he transfers the shares to a *bona fide* purchaser for value the company may be liable.

**311.** It is the transferee who usually makes the application for registration of the transfer; but the transferor has the same right to apply for registration (see s. 110 and notes thereto).

**312.** If the company improperly refuses to register the transfer, the remedy of the transferor and the transferee is to apply to the Court for rectification of the register (see s. 155 and notes thereto).

#### *Certification of Transfers.*

**313.** The certification by a company of any instrument of transfer of shares or debentures shall be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company the documents of the *prima facie* title of the transferor, but not as a representation that the transferor has any title to the shares or debentures [s. 112 (1)]. As to the effect of erroneous certification made by a company, see sub-s. (2) of s. 112. For other provisions relating to the certification, see sub-s. (3) of s. 112.

#### *Provisions relating to transfer of shares.*

**314.** S. 110 provides that an application for registration of the transfer of shares may be made either by the transferor or the transferee, but if the application is made by the transferor of partly paid shares no registration shall be effected unless the company gives notice of the application to the transferee. The company may of course refuse to register the transfer, if empowered to do so by its articles. Unless the directors decide to exercise this power of refusal, they must, if no objection is made by the transferee within 2 weeks of the receipt of the aforesaid notice, enter the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

**315.** For the manner in which the notice is to be served see sub-s. (3) of s. 110; and as to the execution of the instrument of transfer see s. 108.

**316.** If the company refuses to register the transfer of any shares or *debentures* it must, within 2 months from the date on which the instrument of transfer was lodged, send to the transferee as well as the transferor notice of the refusal [see sub-s. (2) of s. 111]. For the consequences of default see that sub-section.

**317.** As to the new provisions for and relating to appeal to the Central Government against any refusal or failure of the company to register the transfer or failure to send notice of its refusal, see sub-ss. (3) to (7) of s. 111.

*Right of the legal representative of deceased shareholder to transfer.*

**318.** The legal representatives of a deceased member is entitled to transfer the shares standing in the name of the latter without being himself registered as a member (see s. 109 and notes thereto).

*Stamp.*

**319.** For stamp on an instrument of transfer see App. F.

### **Transmission of Shares.**

**320.** On the death of a member, the survivors where the member was a joint holder, and his legal representatives where he was a sole holder, will be the only persons recognised by the company—see reg. 25 of Table A.

As to the right of a person becoming entitled to a share in consequence of the death or insolvency of a person, see regs. 26 to 28 of Table A.

**321.** The company should keep a book for noting the contents of the probate, letters of administration, succession certificates and decrees of the Court directing the rectification of register of members under s. 155 or declaring the title of a particular person or persons to particular shares. Powers of attorneys sent to the company for noting their contents may also be noted in this book.

**322.** Shares or stock registered in the name of a lunatic can be transferred only under order made in lunacy by the person named in the order (see N. 589).

### **Share-warrants to Bearer.**

**323.** A public company limited by shares, if so authorized by the articles, may with the previous approval of the Central Government issue share warrants to bearers with respect to fully paid up shares and provide by coupons or otherwise for the payment of dividends (see s. 114 and Form 109 in App. E). The advantages of a share-warrant are that it entitles the bearer to the shares therein specified and they are transferable by delivery of the warrant [s. 114 (3)].

**324.** On the issue of a share-warrant the company should strike out of the register of members the name of the member and enter instead the particulars mentioned in s. 115. Upon the surrender of the share-warrant for cancellation the date of the surrender should be entered in the register of members, and the bearer thereof will, subject to the articles, be entitled to have his name entered as a member in the register of members. If the company enters in the register the name of a bearer of share-warrant without the same being surrendered and cancelled, it will be responsible for any loss incurred by any person for thus entering the name of the bearer (see s. 115). Penalty is provided in sub-s. (6) of that section for default in complying with the requirements thereof.

### Borrowing.

**325.** In order to carry out the objects of a company it is sometimes necessary for it to borrow money. In the case of a trading or a banking company the power to borrow money is implied (see notes to ss. 13, 47, 125 and 143); but in other cases the power should be taken in the memorandum or in the articles of association. Where power is given by the articles of association to raise money on the security of the company's uncalled share capital, and there is nothing in the memorandum to the contrary, the uncalled share capital may be effectually charged [*Newton v. Debenture Holders of Anglo-Australian &c. Co.* (1895) A.C. 244 (P.C.)]. Where there is a power to borrow, the company can give security for the money as incidental to the power of borrowing, and create a mortgage or charge on any property or undertaking of the company.

### *Mortgage and charge.*

**326.** Where a company after 1st April, 1914 creates a mortgage or charge (a) for securing any issue of debentures, (b) on its uncalled share capital, (c) on any immovable property, wherever situate, or interest therein, (d) on any book debts, (e) a mortgage or charge not being a pledge on any movable property except stock-in-trade, (f) a floating charge on the undertaking or property of the company, including stock-in-trade, (g) a charge on calls made, but not paid, (h) a charge on a ship, or a share thereof, or (i) a charge on goodwill, on a patent or a license under a patent or trade mark or on a copyright or a license under a copyright, every such mortgage or charge, so far as the security is concerned, shall be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge together with the instrument or a copy thereof verified in the prescribed manner are filed with the Registrar for registration within 21 days of the creation thereof (see s. 125). This section should be read carefully and for the meaning of the expressions used therein, e.g., "debenture", "charge", "fixed", "specific" and "floating" charges, "undertaking" &c. and for general commentary on the section see notes to that section.

**327.** Where any mortgage or charge on any property has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, will be deemed to have notice of the said mortgage or charge as from the date of such registration (see s. 126).

As to the prescribed particulars of such charge, see Form No. 8 in Appendix B.

**328.** The aforesaid prescribed particulars should be filed with the Registrar within 21 days as mentioned above. The Registrar will enter the particulars in the register kept by him. After making the entry the Registrar will return the instrument or the verified copy, as the case may be. The register is open to inspection on payment of a fee of one rupee (see s. 130). The Registrar will also give a certificate of registration which will be conclusive evidence of compliance with the provisions of Part V of the Act (s. 132).

**329.** S. 127 provides that where a company acquires any property which is subject to a charge of any kind, the company shall cause the prescribed particulars of the charge together with a copy [certified in the prescribed manner] of the instrument, if any, by which the charge

was created or evidenced, to be delivered to the Registrar for registration within 21 days after the date on which the acquisition is completed, or in case the property is situate and the charge was created outside India, within 21 days after the date on which the copy of the instrument could have been received in due course of post. For the consequence of default see sub-s. (2) of s. 127.

As to the particulars of charge prescribed under s. 127, see Form No. 9 in Appendix B.

**330.** Where a series of debentures is created by a company, it must file with the Registrar within 21 days after execution of the deed the particulars mentioned in s. 128. Where more than one issue is made of debentures in the series certain other particulars are to be filed with the Registrar. See the proviso of s. 128. For forms to be used in such cases see Forms Nos. 10 and 11 in Appendix B. As to the chronological index to the register of mortgages and charges to be kept by the Registrar see s. 131. For the form of such index, see Form No. 12 in App. B.

**330A.** As to the particulars in case of commission etc. paid on debentures, see s. 129. As to the register of charges, index to that register and certificate of registration, see ss. 130, 131 and 132 respectively. The company must cause a copy of every such certificate of registration to be endorsed on debenture or certificate of debenture stock (s. 133).

**331.** The registration of the aforesaid particulars may also be effected on the application of any person interested therein, and in such case he will be entitled to recover from the company the fees properly paid by him for registration [s. 134 (2)].

**332.** Whenever the terms, conditions, extent or operation of any mortgage or charge so registered are modified, the company must send to the Registrar the particulars of such modification for registration (see s. 135), and such registration may also be effected on the application of any person interested therein (*ibid*).

For the form of register of charges and memorandum of satisfaction pursuant to ss. 130, 135 and 137, see Form No. 13 in App. B. As to the form of complete satisfaction of charge under s. 138, of particulars of modification of charge under s. 135 and of notice to be given by receiver or manager on ceasing to act as such under s. 137 (2), see Forms Nos. 17, 14 and 16 respectively.

**333.** A copy of every instrument creating a mortgage or charge requiring registration under s. 125 should be kept at the registered office of the company; but in the case of a series of uniform debentures a copy of one such debenture will be sufficient (s. 136).

As to the notice of appointment of Receiver or manager under s. 137, see Form No. 15.

**334.** Where there is an omission to register a mortgage or charge within 21 days as provided in s. 125 or there is omission or misstatement of any necessary particular or omission to give intimation to the Registrar of the payment or satisfaction of a debt for which a charge or a mortgage was created, due to accident, inadvertence or some other sufficient cause, the Court may, on the application of the company or any interested person, extend the time for registration or order the omission or misstatement to be rectified (s. 141). Where the Court extends the time, the order will not prejudice any rights acquired before the actual registration [s. 141 (3)].



**335.** S. 138 provides that a company must give intimation to the Registrar of the payment or satisfaction of any mortgage or charge requiring registration under s. 125, within 21 days from the date of payment or satisfaction. On receipt of this intimation the Registrar will cause notice to be sent to the mortgagee calling upon him to show cause, within a time (not exceeding 14 days) to be fixed by such notice, why the payment or satisfaction should not be recorded; and if no cause is shown, the Registrar will order that a memorandum of satisfaction be entered on the register. If cause is shown, the Registrar will record a note to that effect in the register, and will inform the company that he has done so (s. 138).

**336.** As to the consequences of default in complying with any of the above provisions see s. 142.

**337.** Every company should also keep a register of charges as provided in s. 143. For penalty for omission to keep such a register and to enter the required particulars see s. 143 (2).

**338.** The copies of the instruments of mortgages and charges and the register of mortgages kept at the registered office of a company under ss. 136 and 143 respectively are open to inspection of any creditor or member of the company without fee, and the register of mortgages is open to inspection of any other person on payment of a fee not exceeding one rupee for each inspection (see s. 144). As to the penalty for default see sub-s. (3) of s. 144. The Court may also by order compel an immediate inspection of the said copies or registers [s. 144 (4)].

### Debentures.

**339.** For the purpose of borrowing money or in payment for property purchased or for securing the repayment of money borrowed a company usually issues debentures or debenture-stock. For the meaning of these expressions see N. 48 and notes to s. 125. As to the form of debenture see Form 141 in App. E.

**340.** 340. Debentures may be for a fixed term of years, or repayable on notice or irredeemable (see s. 120 and notes thereto). They can also be framed as payable to bearer (N. 48 and notes to ss. 125 and 118).

**341.** Debentures may or may not give security on the company's assets, but generally mortgage debentures are issued creating a "fixed" charge on some or all properties of the company or a "floating charge" on all the properties and assets of the company, present and future. As to the distinction between a "fixed" and a "floating charge" see N. 49 and notes to s. 125 and s. 123.

**342.** Debentures or debenture-stock are sometimes secured by a trust deed conveying the company's property to trustees for the debenture holders charging other property and containing provisions regulating the rights of the company and the debenture-holders (see ss. 118 and 119). The advantages of a trust deed are (1) that a legal estate is vested in the trustees; (2) that they can look after the interests of all the debenture-holders for whom it is sometimes difficult to take common action to protect their interests; (3) the trustees can sell the property secured; and (4) they can, if so empowered in the deed, appoint receivers to carry on the business. As to the liability of trustees for debenture-holders, see s. 119.

343. Debentures are offered to the public for subscription by means of prospectus in the same way as shares. For form of a skeleton prospectus see Form 137 in App. E, for form of application see Form 138 in App. E and for form of the letter of allotment see Form 139 in App. E.

344. After the commencement of this Act no company shall issue any debentures carrying voting rights at any meeting of the company—see s. 117.

345. Debentures to bearers may be transferred by delivery, but ordinarily transfer is made by an instrument in writing as in the case of shares (see Form 140 in App. E).

346. Where a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it will be sufficient for the purposes of s. 125, if there is filed with the Registrar the particulars mentioned in s. 128 within 21 days after the execution of the deed containing the charge, or, if there is no such deed, after the execution of any debentures of the series together with the deed or a copy thereof verified in the prescribed manner or one of the series of debentures. Where more than one issue is made of debentures in the series, particulars of the date and amount of each issue are to be filed with the Registrar (s. 128).

347. Where any commission, allowance or discount is paid or made directly or indirectly in connection with the issue of any debentures, the particulars required to be filed for registration under ss. 125 and 128 should include particulars as to the amount or rate per cent. of such commissions &c. (s. 129). The company should also cause a copy of every certificate of registration given by the Registrar under s. 132 to be endorsed on every debenture or certificate of debenture stock issued by the company and secured by the mortgage or charge so registered (s. 133).

348. A company should keep a register and index of debenture-holders (see s. 152 and Form 106 in App. E) which will, except when closed (for not exceeding 45 days in a year) (see s. 154) be open to the inspection of the registered holder of any such debenture and of every shareholder and they may require a copy of the register or any part thereof on payment of 6 as. for every 100 words or fractional part thereof (see s. 163). Similarly every debenture holder may get a copy of any trust deed for securing any issue of debentures on payment of one rupee in the case of a printed trust deed, and in any other case on payment of 6 as. for every 100 words or fractional part thereof (see s. 118). For penalty for refusal of inspection or copy see s. 163 (5), and the Court may compel immediate inspection and direct extracts and copies to be taken or sent [s. 163 (6)].

349. As to a company's power to re-issue redeemed debentures see s. 121.

350. A contract for taking debentures may be enforced by a decree for specific performance, while a contract for taking a mortgage cannot be so enforced (see s. 122 and notes thereto).

### Stamp.

351. As to the stamp duty on debentures and transfer of debentures see App. F.

*Interest.*

**352.** When interest on a debenture is paid, income-tax is deducted by the company and a certificate under s. 18 (g) of the Income-tax Act, 1922 is granted to the debenture-holder. For form of such a certificate see Form 125 in App E.

*Receivers.*

**353.** In a suit by a secured creditor the Court may appoint a receiver when it appears that the security is in danger or "jeopardy" (see notes to s. 123). A receiver may also be appointed by the debenture-holders under the powers contained in the debenture. In the latter case the power is fiduciary and must be exercised for the benefit of the debenture-holders generally. As to the appointment, position, powers and liability of a receiver see notes to ss. 123 and 137.

**354.** When an order is obtained from the Court for the appointment of a receiver of the property of a company, or a receiver is appointed under the powers contained in an instrument, he must within 15 days from the date of the order or appointment file notice of the fact with the Registrar (s. 137). For penalty for omission to file the aforesaid notice see s. 137 (3).

In the case of a receiver appointed under the powers contained in an instrument and where he has taken possession of the company's property, he must file half yearly accounts with the Registrar so long as he remains in possession (see s. 421) and must also file, on ceasing to act as receiver, a notice to that effect with the Registrar (*ibid*). S. 422 provides that where a receiver has been appointed of a company's property, every invoice, order for goods, or business letter issued by or on behalf of the company or the receiver of the company, being a document on or in which the company's name appears, must contain a statement that a receiver has been appointed. As to the penalty for default in complying with any of the above provisions see s. 423.

**355.** Where a receiver is appointed on behalf of the debenture-holders or possession is taken by or on behalf of those debenture-holders of any property of the company, then if the company is not at the time in course of being wound up, the debts mentioned in s. 530 must be paid forthwith out of the assets coming to the hands of the receiver or other person taking possession, in priority to any claim for principal or interest in respect of the debentures (see s. 123).

**356.** SS. 421 to 423 shall apply to the receiver of, or any person appointed to manage, the property of a company, appointed by a Court or under the powers contained in an instrument, in like manner as they apply to a receiver appointed under any powers contained in an instrument (s. 424).

**Statutory Meeting.**

**357.** A company with a share capital other than a private company must, within a period of not less than 1 month nor more than 6 months from the date at which it is entitled to commence business (see s. 149) hold a general meeting of the shareholders which is called the "statutory meeting" (see s. 165). The notice convening the meeting must state that it is to be the "statutory meeting."

**358.** At least 21 days before the meeting the directors should forward the "statutory report" to every member of the company and other persons entitled to receive it. The report should set out matters contained in cls. (a) to (h) of sub-s. (3) of s. 165 and it must be certified by not less than 2 directors one of whom shall be a managing director where there is one [s. 165 (4)]. The shares allotted, the cash received in respect of such shares and the receipts and payments shown in the report must be signed by the auditors of the company (*ibid*). A copy of the statutory report certified as aforesaid is to be filed with the Registrar forthwith after sending it to the members. For the consequences of default see sub-s. (9) of s. 165. The Board shall cause a list of members produced at the commencement of the meeting—see s. 165 (6).

For the form of the statutory report, see Form No. 22 in Appendix B.

**359.** The members present at the statutory meeting are entitled to discuss any matter relating to the formation of the company or arising out of the statutory report, but if a resolution is desired to be passed, previous notice thereof must be given in accordance with the articles [s. 165 (7)]. The meeting may be adjourned from time to time and notice of a resolution may be given in accordance with the articles after the original meeting and before the adjourned meeting which has all the powers of the original meeting [s. 165 (8)]. For minutes of a statutory meeting see Form 108 in App. E.

**360.** If default is made in filing the statutory report or in holding the statutory meeting the company may be ordered to be wound up by the Court [s. 433 (b)]. But if a petition is presented to the Court for winding up the company on this ground the Court may, instead of directing a winding up, give directions for the statutory report to be filed or the statutory meeting to be held. See s. 443 (3) (a).

### **Annual General Meeting.**

**361.** The first annual general meeting shall be held within 18 months from the date of incorporation of the company. The next annual general meeting shall be held within 9 months of the expiry of the financial year [for definition see s. 2 (17)] in which the first annual general meeting was held, and thereafter within 9 months of the expiry of each financial year: Provided the Registrar may, for any special reason extend the time by not more than 6 months. Except as above, not more than 15 months shall elapse between the dates of a General meeting and the next. See s. 166. But the Registrar has no power to extend the date of the first annual general meeting. For the consequences of default in complying with s. 166 see s. 168. In case of default the Central Government may, on the application of any member, call or direct the calling of a general meeting (see s. 167). As to the penalty for default in complying with the directions given by the Central Government under s. 167 (1), see s. 168.

**362.** At such an annual general meeting a report of the directors regarding the working of the company is submitted, accounts and balance-sheets with profit and loss accounts with the auditor's report thereon are presented, dividends are declared and directors and auditors are elected.

*Proceedings of annual general meetings.*

**363.** Before the time of the meeting the secretary should have ready on the table typed agenda paper with spaces for the chairman's or the secretary's notes (see Form 121 in App. E), the original directors' report, balance-sheet and the auditor's report and a sufficient number of printed copies thereof, the register of members, minute-book of general meetings, index of members' addresses and specimen signatures (of members) book and proxies received with the date and time noted thereon. As each member enters the room his signature should be taken in a book kept for the purpose.

**364.** After election of the chairman or, if no election is necessary under the articles, after he has taken the chair, the chairman will conduct the proceedings in accordance with the articles and the provisions of the Act and proceed with the items on the agenda paper, the secretary taking notes of the proceedings.

**365.** As to the form of the minutes of an annual general meeting see Form 122 in App. E, that of a demand for poll see Form 130 in App. E and that of a list of members and votes &c. in the matter of taking poll see Form 131 in App. E.

*Proceedings of general meetings.*

**366.** The following provisions specified in ss. 171 to 186 shall, *notwithstanding anything to the contrary in the articles* of a company, apply with respect to general meetings of a public company and of a private company which is a subsidiary of a public company. They shall, unless otherwise provided in the articles apply with respect to general meetings of a private company which is not a subsidiary of a public company [sub-s. (1) of s. 170].

**367.** As to the application of s. 176 relating to proxies to meetings of any class of members or of debenture-holders or any class of them, see cl. (a) of sub-s. (2) of s. 170 and as to the application of ss. 171 to 175 and 177 to 186 to these meetings, see cl. (b) of that sub-section.

For the form in which ss. 171 to 186 are to apply to meetings of any class of members, of the debenture holders, and of any class of debenture holders, see Annexures B, C and D respectively printed towards the end of Appendix B.

*Notice of a general meeting.*

**368.** At least 21 days' notice is required for a general meeting [sub-s. (1) of s. 171]. As to when a shorter notice will do see sub-s. (2) of s. 171.

**369.** For the contents and manner of service of notice and the persons on whom it is to be served, see s. 172, and as to the explanatory statement to be annexed to a notice, see s. 173.

**370.** As to the notice calling an annual general meeting, see Form 120 in App. E.

*Quorum for meeting.*

**371.** Unless the articles provide for a larger number, 5 members personally present in the case of a public company, and 2 members

personally present in the case of a private company, shall be the quorum—s. 174.

*Chairman of meeting.*

372. Unless the articles otherwise provide, the election of chairman of a meeting shall be made in accordance with the provisions of s. 175.

*Proxies.*

373. As to the appointment and instrument of proxies and their right of voting, inspection of proxies, expenses of sending them, etc. see s. 176.

*Poll.*

374. As regards a demand for poll, the time of taking it and appointment of scrutineers thereat, see ss. 179, 180 and 184 respectively. For the manner of taking poll and result thereof, see s. 185.

*Voting.*

375. Unless a poll is demanded under s. 179 the voting must be by show of hands in the first instance (s. 177) and the chairman's declaration of result of voting by show of hands will be conclusive—s. 178.

376. As to the restrictions on the exercise of voting right of members who have not paid calls, etc. see s. 181; and as to the restriction in other cases to be void, see s. 182.

377. As to the right of a member to use his votes differently, see s. 183.

*Power of Court to Order Meeting to be Called.*

378. If for any reason it is impracticable to call a general meeting other than an annual general meeting, the Court may, either of its own motion or on the application of any director or member (who will be entitled to vote) order a meeting to be called, held and conducted in such manner as the Court thinks fit, and give ancillary and consequential directions in relation thereto—see s. 186.

*Resolutions requiring Special Notice.*

379. As to the provisions relating to the resolutions requiring special notice see s. 190. As to where special notice is required to be given see Note 883A under s. 190.

*Resolutions passed at Adjourned Meetings.*

380. Where a resolution is passed at an adjourned meeting of a company or in a class meeting or in a Board meeting, the resolutions will be treated as having been passed on the date on which it was in fact passed—s. 191.

*Registration and Copies of certain Resolutions and Agreements.*

381. As to the provisions relating to the registration by the Registrar of resolutions or agreements specified in sub-s. (4) of s. 192, see sub-s. (1) thereof.

For the form of such registration, see Form No. 23 in Appendix B.

**382.** Where articles have been registered a copy of every such resolution or agreement must be embodied in or annexed to every copy of the articles issued after the passing or making thereof—see s. 192 (2). Where articles have not been registered, a printed copy of every such resolution or agreement must be sent to any member at his request on payment of rupee one—s. 192 (3).

**383.** For penalties for default in complying with sub-s. (1), (2) or (3) of s. 192 see sub-ss. (5) and (6) thereof respectively.

### *Publication of Reports of Proceedings of General Meetings.*

**384.** No report of the proceedings of any general meeting must be circulated or advertised at the expense of the company, unless it includes matters required by s. 193 to be contained in the minutes [s. 197 (1)]. As to the penalty for default in complying with the provisions of sub-s. (1) of s. 197, see sub-s. (2) thereof.

Notice of an annual general meeting should be given to the auditors who are entitled to receive the same and to attend a general meeting at which any accounts examined and reported on by them are to be laid before the company and they may be heard thereat on any part of the business which concerns him as auditor (s. 231). As to the penalty for default (see s. 232).

### **Balance-sheet and Reports of Directors and Auditors.**

**385.** Under s. 210 at every annual general meeting the Board of directors must lay a balance-sheet and profit and loss account, or in the case of a company not trading for profit, an income and expenditure account for the period, in the case of the first account since the incorporation of the company and ending with a day not earlier than the day of the meeting by more than 9 months, and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than 9 months and the extended period under s. 166 (1) (c) proviso, if any. As to the penalty for default see sub-s. (5) of s. 210. For the form and contents of the balance-sheet and profit and loss account, see s. 211. As to the penalty for non-compliance with the provisions of s. 211, see sub-s. (7) of that section.

**386.** The balance-sheet and the profit and loss account &c. will have to be audited by the auditor of the company and his report attached thereto. The secretary must read the auditor's report at the meeting and it will be open to inspection by the members. See s. 216, 227 (2) and (3) and 230.

**387.** Every company, must send a copy of the balance-sheet &c. so audited to the registered address of every member and every trustee for debenture-holders at least 21 days before the meeting. For detailed provisions see s. 219. The balance-sheet and profit and loss account must be approved by the Board of directors before they are so signed and before they are submitted to the auditors for their report [s. 215 (3)].

S. 217 lays down, what has hitherto been the practice, that the Board shall make out and attach to every balance-sheet their report regarding the state of the company's affairs, the amount, if any, which they recommend to be paid as dividend and the amount, if any, they

propose to carry to the Reserve Fund &c, shown specifically in the balance sheet or to a Reserve Fund &c. to be shown specifically in a subsequent balance-sheet, as well as other matters specified in sub-s. (2) of s. 217.

S. 212 requires a holding company to include in the balance-sheet particulars as to its subsidiary companies. For details in this respect read carefully that section. For meaning of "holding company" and "subsidiary company" see s. 4. As to the financial year of holding and subsidiary companies, see s. 213. As to the rights of the holding company's representatives and members, see s. 214.

**388.** Sub-s. (5) of s. 217 provides penalty for default in complying with the provisions of that section. As to the penalty for improper issue, circulation or publication of balance-sheet or profit and loss account, see s. 218.

**389.** After the balance-sheet and profit and loss account or the income and expenditure account has been laid before the company at the annual general meeting three copies thereof signed by the managing director, etc. with three copies of all documents required by the Act to be annexed or attached thereto are to be filed with the Registrar (see s. 220). For the consequences of default see sub-s. (3) of s. 220.

**390.** If the general meeting does not adopt the balance-sheet, a statement of that fact and of the reasons therefor is to be annexed to the balance-sheet and the copies thereof required to be filed with the Registrar [sub-s. (2) of s. 220].

**391.** A private company is required to send to the Registrar three copies of the balance-sheet only certified to be true copies by the company's auditors together with the auditor's report in so far as it relates to the balance-sheet [s. 220 (1) (b)].

Any member and any debenture-holder and any trustee for debenture-holders are entitled to be furnished with copies of the balance-sheet and the profit and loss account or the income and expenditure account and the auditor's report without charge [see s. 219]. As to the consequences of default see sub-s. (3) of s. 219; and the Court may direct furnishing of the copy [s. 219 (4)].

**392.** Holders of preference shares and debentures of a company have the same right to receive and inspect its balance-sheets and the directors' and auditor's reports as is possessed by the holders of ordinary shares (s. 219). This provision does not apply to a private company [see sub-s. (5) of s. 219].

#### *Duty of Officer to make Disclosure of Payments, etc.*

**393.** As to the duty of the concerned officer of the company to furnish without delay any particulars or information required to be given in the balance-sheet etc. see sub-ss. (1) to (3) of s. 221. As regards penalty for default in performing the duty see sub-s. (4) thereof. For construction of reference to documents annexed to the accounts, see s. 222.

#### **Dividend and Reserve.**

**394.** A company declares dividends at the annual general meetings; but the directors may pay such interim dividends as appear to



them to be justified by the profits, if the articles so provide (see reg. 86, Table A).

**395.** No dividend can be paid out of capital and if the directors make such payment they may be personally liable. S. 205 provides that no dividend shall be declared or paid except out of the profits of the company or out of moneys provided by the Central Government or State Government for the payment of the dividend in pursuance of a guarantee given by such Government. As to a general discussion on this subject see the rather elaborate notes given under that section.

**396.** No dividend shall be paid on a share except (a) to the registered holder thereof or to his order or to his bankers; or (b) to the bearer of a share-warrant issued under s. 114 (s. 206). As to the penalty for failure to distribute dividends within 3 months of its declaration, and the cases in which the offence is not committed, see s. 207.

**397.** Reg. 88 of Table A provides that subject to the rights of members with special rights as to dividends, all dividends are to be paid according to the amounts paid or credited as paid on the shares. In the absence of such a provision in the articles members are entitled to dividend in proportion to their shares and not in proportion to the amounts paid thereon (see notes to reg. 88). S. 93 of the present Act provides that a company may, if so authorised by the articles, pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others. As to who are entitled to the dividends and the rights of preference share-holders and others see notes to reg. 88 of Table A.

**398.** After declaration of a dividend a notice and warrant is sent to each shareholder entitled to the dividend. For form of such notice and warrant see Form 123 in App. E.

**399.** In calculating dividend income-tax is deducted by the company from the amount due to each shareholder and a certificate of such deduction is given in the warrant itself. For form of such a dividend warrant with income-tax certificate see Form 124 in App. E. As the income-tax is deducted at a certain rate in accordance with the Income-Tax Act, the shareholder on production of the income-tax certificate attached to his dividend warrant may get a refund from the income-tax authorities, if according to his income he is liable to pay income-tax at a lower rate.

**400.** For the form of Dividend Book see Form 126 in App. E.

**401.** Directors are not bound to distribute the whole profits of a year as dividends. The articles generally provide, as in Table A (see reg. 85) that no dividend shall exceed the amount recommended by the directors and that they may set apart certain amount as a reserve or reserves for particular purposes (see reg. 87 and notes thereto). Unless a sufficient reserve fund is built in this way the company is sure to come to grief in a succession of bad years or in the event of an unforeseen calamity.

**402.** A company may, if so authorized in the articles, capitalize its profits kept in a reserve or any other account, and issue fully paid up shares or debentures to the members entitled to the same. For a detailed discussion see notes to regs. 85, 96 and 97 of Table A and notes thereto.

*Summary of share-capital and list of members.*

**403.** Every company having a share capital must, within one month of the holding of the annual general meeting under s. 166, make and file with the Registrar a return containing particulars specified in Part I of Sch. V as they stood on that day. The said return shall be in form set out in Part II, Sch. V (see s. 159). As to the annual return to be made by a company not having a share capital, see s. 160. Further provisions regarding the annual return and the certificate to be attached thereto have been made in s. 161. For the consequences of default in complying with the above provisions see s. 162.

**404.** As to the place of keeping and inspection of registers and returns, see s. 163. The registers of members and debenture-holders, the annual returns, certificates and statements referred to in ss. 159 to 161 shall be *prima facie* evidence of matters directed or authorised to be inserted therein by this Act (s. 164).

**Extraordinary General Meeting.**

**405.** Where some special business requires it the directors may call an extraordinary general meeting. Where it is necessary to pass a "special resolution" (see s. 189) an extraordinary general meeting must be called. As to the notice of such a meeting see Form 127 in App. E.

**406.** Where a considerable number of members, dissatisfied with the management of the company or for any other valid reason desire that an extraordinary general meeting should be called, a requisition, signed by the number of members specified in s. 169 (4), may be served upon the directors (for form of the requisition see Form 132 in App. E) who should immediately proceed to call an extraordinary general meeting. The requisition should state the object of the meeting and may consist of several documents in like form each signed by one or more requisitionists and deposited at the registered office of the company. If the directors do not cause the meeting to be called within 21 days from the date of deposit of the requisition, the requisitionists or a majority of them as specified in cls. (a) to (c) of sub-s. (6) of s. 169, may themselves call the meeting; but in either case the meeting so called should be held within 45 days from the date of deposit of the requisition (see s. 169). If a special resolution is sought to be passed, at least 21 days' notice specifying the intention to propose the resolution as a special resolution should be given. See s. 189 and Explanation to sub-s. (6) of s. 169.

**407.** Any meeting called by the aforesaid requisitionists should be called in the same manner, as nearly as possible, as that in which meetings are to be called by the directors [s. 169]. The meeting shall not be held after 3 months from the date of deposit of the requisition [s. 169 (7)].

**408.** Sub-s. (9) of s. 169 provides that any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration to such of the directors as were in default. This provides a salutary check on the directors who may be inclined to ignore the requisition.

SS. 171 to 186 will apply to the proceedings of all general meetings (s. 170).

**409.** Extraordinary resolution has been abolished by the present Act as unnecessary. There are now 'three kinds of resolutions only, namely, ordinary resolution, "special resolution" (see s. 189) and "resolution requiring special notice" (see s. 190 and notes thereto).

**410.** It should be noted that for the purpose of passing a special resolution the notice calling the general meeting should specify the intention to propose the resolution as a special resolution and the votes cast in favour of the resolution (whether on a show of hands or on a poll) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy are not less than three times the number of votes, if any, cast against the resolution by members so entitled and voting (see s. 189).

**411.** As to the form of the notice, see Forms 128 in App. E.

**412.** For forms of proxy, demand for poll and list of members in the matter of taking a poll see Forms 129, 130 and 131 respectively in App. E.

**413.** As to the form of a special resolution see Form 134 in App. E, and a specimen of such a resolution is given in Form 135 following.

**414.** In the case a body corporate (whether a company within the meaning of the present Act or not) it is not necessary that for voting on its behalf at a meeting of another company a proxy or power of attorney is to be given. It is sufficient if the former by a resolution of its directors or other governing body authorize any person to act as its representative at any meeting of the latter company (see s. 187).

**415.** A printed or type-written copy of a special resolution and other resolutions and agreements mentioned in cls. (a) to (f) of sub-s. (4) of s. 192 duly certified under the signature of an officer of the company is to be filed with the Registrar within 15 days from the passing of the same (s. 193).

See Form 136 in App. E.

**416.** Where articles have been registered a copy of every resolution and agreement mentioned above for the time being in force must be embodied in or annexed to every copy of the articles issued after the date of the resolution. Where articles have not been registered a copy of every special resolution must be sent in print to any member at his request on payment of one rupee or such less sum as the company may direct (see s. 192). For default in complying with these provisions the company and its officers will be liable to the penalties provided in sub-s. (5) and (6) of s. 192.

### **Minute Books.**

**417.** All companies must keep in separate books minutes of the proceedings of general meetings, Board meetings and meeting of committees of directors. For contents of such minute-books see s. 193 (3) to (4). For consequences of default in complying with the provisions of s. 193 see sub-s. (6) thereof. Every such minute should be signed by the chairman of

the meeting or of the next meeting, and it will be evidence of the proceedings (s. 194) and a presumption arises to the validity of calling, holding and proceedings of the meeting including all appointments of directors or liquidators (see s. 195).

418. The minute book of a *general meeting* held after 15th January, 1937 shall be kept at the registered office of the company and shall during business hours be open to inspection of any member without charge, and any member shall be entitled to be furnished within 7 days of his request with a copy of the minutes at a charge not exceeding 6 as. for every 100 words (s. 196). For the penalty for not allowing such inspection or furnishing such copy see sub-s. (3) of s. 196 and the Court may by order compel an immediate inspection by, or direct that the copy be sent to, the member [sub-s. (4) of s. 196].

### Audit.

419. The first auditors of a company shall be appointed by the Board of directors within 1 month of the date of registration of the company and they shall hold office until the conclusion of the first annual general meeting, unless previously removed by a resolution of the members in general meeting, in which case such members at that meeting may appoint auditors [see s. 224 (5)]. The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the remaining auditor or auditors (if any) may act. Provided that where such vacancy is caused by registration of an auditor, the vacancy shall be filled by the company in general meeting. Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting [s. 224 (6)]. The directors may also fix the remuneration of the auditors thus appointed by them. In any other case the remuneration is to be fixed by the company in general meeting [see s. 224 (8)].

420. Save as mentioned above every company must at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting [s. 224 (1)] until the conclusion of the next annual general meeting.

421. At any general meeting a retiring auditor, by whatsoever authority appointed, shall be re-appointed, unless events mentioned in cls. (a) to (d) of sub-s. (2) of s. 224 occur. Where at an annual general meeting no auditors are appointed or re-appointed, the company shall within one week give notice of that fact to the Central Government which will appoint a person to fill the vacancy [see sub-ss. (3) and (4) of s. 224]. In such a case the Central Government may fix the remuneration of the auditor [s. 224 (8) (a)].

422. Special notice will be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be re-appointed [s. 225 (1)]. For subsequent procedure, see sub-ss. (2) and (3) of that section which will also apply to a resolution to remove the first auditors or any of them under s. 224 (5) or to the removal of any auditor or auditors under s. 224 (7) as they apply to in relation to a resolution that a retiring auditor shall not be re-appointed [s. 225 (4)].

**423.** No person can be appointed or act as auditor of a company unless he is a Chartered Accountant within Chartered Accountant's Act XXXVIII of 1949 or is for the time being authorised by the Central Government under cl. (b) of sub-s. (1) of s. 226.

**424.** As to the qualification of an auditor for acting in a Part B State, see sub-s. (2) of s. 226. For the Restricted Auditors' Certificates (Part 'B' States) Rules, 1956 made by the Central Government under s. 226 (2) (b) of the Act see Appendix B (towards its end).

**425.** A body corporate cannot be appointed auditor of a company [s. 226 (3) (a)]. For other persons who shall not be qualified for appointment as an auditor see sub-ss. (3) and (4) of s. 226. If an auditor becomes subject after his appointment to any such disqualification he shall be deemed to have vacated his office [s. 226 (5)].

**426.** As to the powers and duties of auditors, what their reports and certificates should contain, &c. see s. 227 and notes thereto.

**427.** An auditor may be liable for misfeasance mentioned in s. 543 (see notes to that section). He may be liable to heavy punishment, if he destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document of the company with intent to defraud or deceive any person [see s. 539].

**428.** As to the provisions relating to the audit of accounts of a branch office of a company, see s. 228. For signature and authentication of audit report etc., see s. 229.

**429.** The auditor's report must be read before the company in general meeting and shall be open to inspection by any member of the company (s. 230).

**430.** All notices of and other communications relating to general meeting of a company must be forwarded to the auditor also who shall be entitled to attend any general meeting and to be heard thereat (s. 231).

**431.** As to the penalty for non-compliance by a company with ss. 225 to 231, see s. 232; and as to the penalty for non-compliance by the auditor with ss. 227 and 229 see s. 233.

#### *Further Provisions relating to Auditors.*

**432.** For the purposes of ss. 477, 478, 539, 543, 545, 621, 625 and 633, and for no other provision of this Act, the word "officer" includes an auditor [s. 2 (30)].

**433.** Sub-s. (4) of s. 165 provides that the statutory report shall, so far as relates to the shares allotted by the company and to the cash received in respect of such shares and to the receipts and payments of the company on capital account be certified as correct by the auditors. S. 201 provides that any provision made in the articles or a contract for indemnifying any person employed as an auditor by the company against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence &c. shall be void. But the company may indemnify him against any liability incurred by him in defending

any civil or criminal proceedings in which judgment is given in his favour, or in which he is acquitted, or if any relief is granted to him under s. 633 (see s. 201).

434. Where a prospectus is issued by a company, the prospectus must set out a report by the auditors with respect to the matters set out in item 24 of Part II of Sch. II of the Act. See s. 56 (1) and Part II of Sch. II.

435. S. 242 provides that if upon the report made by the Inspector under s. 241 prosecutions are instituted against a person or persons, it will be the duty of all officers of the company, (other than the accused), to give to the Central Government all assistance in connection with the prosecutions [see s. 242].

436. As to the obligation of the auditors regarding the balance-sheet and the profit and loss account see ss. 227, 228 and 229.

437. As to the penalty for non-compliance with ss. 226 and 229, see s. 232.

438. S. 231 provides that the auditors shall be entitled to receive notices of and attend any general meeting of the company at which any accounts examined or reported on by them are to be laid, and they will be entitled to attend any general meeting and to be heard thereat on any part of the business which concerns them as auditors.

439. S. 545 has made detailed provisions for instituting criminal proceedings against past or present directors, managers or other officers [including auditors—see s.2 (30)] if it appears to the Court or the liquidator (in a voluntary winding up) in the course of a winding up of the company that any such person has been guilty of any offence in relation to the company for which he is criminally liable. In such proceedings it shall be the duty of the auditor (if he is not an accused person), past or present, to give all assistance in connection with the prosecution [see s. 545]. For the consequences of failure or neglect to give such assistance see sub-s. (8) of s. 545.

440. Under s. 633 the Court has power to give relief to persons employed as auditors of a company if in any proceeding for negligence, default &c. it appears to the Court that the auditors acted honestly and reasonably.

### **Registrar of Companies.**

441. Under s. 13 the memorandum of association of a company must state the State in which its registered office is to be situate. The company must be registered at an office established in that State by the Central Government under s. 609.

442. Any person may inspect the documents kept by the Registrar on payment of a fee of one rupee for each inspection; and any person may get a certificate of incorporation of any company or a certified copy or extract of any other document or any part thereof on payment of five rupees in the case of a certificate of incorporation and a fee of 6 as. for every 100 words or part thereof required to be copied in the case of a certified copy or extract (see s. 610).

**443.** For fees to be paid to the Registrar see Schedule X to the Act and s. 611. As to the power of the Central Government to reduce the fees,, charges, etc., see s. 613.

*Power of Registrar to call for Information, etc.*

**444.** On perusal of any document submitted to him under the Act if the Registrar is of opinion that any information or explanation is necessary he may by written order call for the same; and all persons who are or have been officers or liquidators of the company are bound to give such information or explanation on pain of a fine not exceeding Rs. 50 in respect of each offence, and the Court may on the application of the Registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the Registrar for his investigation and allow the Registrar inspection thereof on such terms and conditions as it thinks fit. The information or explanation, if furnished, will be annexed to the original document and will be subject to the like provisions as to the inspection and taking of copies as the original document (see s. 234).

**445.** If the information or explanation is not furnished within the specified time or if it appears to the Registrar to be unsatisfactory or if it discloses an unsatisfactory state of affairs, it will be the duty of the Registrar to make a report to the Government [see s. 234 (6)].

**446.** If it is represented to the Registrar in materials placed before him by any contributory or creditor that the business of the company is carried on in fraud of its creditors, or in fraud of persons dealing with the company or for a fraudulent purpose, the Registrar may, after giving the company an opportunity of being heard, by written order call on the company for information or explanation on matters specified in the order. If upon investigation the Registrar is satisfied that the representation upon which he has taken action is frivolous or vexatious, he must disclose the identity of the informant to the company [see s. 234 (7)]. The provisions of s. 234 shall apply *mutatis mutandis* to a liquidator or a foreign company [s. 234 (8)].

**447.** S. 439 (1) (e) gives the Registrar power to make an application to the Court for winding up a company with the previous sanction of the Central Government on the ground mentioned in cls. (b), (c) and (e) of s. 433 [see s. 439 (5)].

**448.** S. 614 provides that if a company having made default in complying with any provision of the Act in respect of filing with, delivering or sending to, the Registrar any return, account or other document or in giving notice to him of any matter, fails to make good the default within 14 days after notice to the company requiring it to do so, the Court may, on an application by any member or creditor of the company or by the Registrar, make an order directing the company or any officer thereof to make good the default within such time as may be specified in the order. Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer thereof responsible for the default.

**Inspection and Institution of Prosecution.**

**449.** Upon the report of the Registrar under s. 234 or on the application of members of a company as provided in cls. (a) and (b) of

s. 235 the Central Government may appoint one or more competent inspectors to investigate the affairs of the company in such manner as the Central Government may direct (s. 235). The members applying are to satisfy the Government of their *bona fides* and may be directed to give security for costs of the inquiry (s. 236). As to the investigation in other cases see s. 237. All persons who are or have been officers of the company are bound to produce to the inspectors all books and documents in their custody or power and the inspectors may examine any person on oath (see s. 240). The inspectors will report their opinion to the Central Government who will send a copy thereof to the company at its registered office and the managing agent, etc. and a further copy to the applicants etc. at their request. For detailed provision, see s. 241. As to the recovery of expenses of investigation etc., see s. 245.

#### *Inspectors.*

450. No firm, body corporate or other association shall be appointed as Inspector under s. 235 or s. 237 (s. 238).

451. For the power of Inspector to carry investigation into the affairs of related companies or of managing agent, etc., see s. 239.

452. As to the power of the Central Government to institute prosecutions on the Inspector's report, see s. 242. For the Central Government's power to make application for winding up the company, body corporate etc. and for an order under s. 397 or 398, see s. 243.

453. Authenticated copies of the Inspectors' report will be evidence in any legal proceeding as opinion of the Inspectors—s. 246.

454. For detailed provision regarding appointment and powers of Inspectors to investigate the ownership etc. of a company, see s. 247; and for the power of the Central Government to require information as to the persons interested in the shares or debentures or interest in the managing agency firm etc., see s. 248.

455. As to the investigation by Inspector regarding associateship with the managing agent, etc. see s. 249.

456. For the Central Government's power to impose restrictions on the issue, transfer, voting rights etc. relating to the shares and debentures where there is difficulty in finding out the relevant facts regarding them, see s. 250.

457. Nothing in ss. 234 to 250 shall require the disclosure to the Registrar, Inspector or the Central Government by the legal adviser of any privileged communication, or by its bankers of any information as to the affairs of any of their customers. See s. 251.

#### **Service and Authentication of Documents etc.**

458. A document may be served on a company by sending it to its registered office by post under a certificate of posting or by registered post, or by leaving it at its registered office (s. 51). A document may be served on the Registrar in similar manner (s. 51).

459. A notice may be given by the company to any member either personally, or by sending it by post to him to his registered address or to the address, if any, within India supplied by him for giving notices



to him [s. 53 (1).] As to when the notice will be deemed to have been served, see sub-s. (2) of s. 53. As to when a notice advertised in a newspaper shall be deemed to have been given see sub-s. (3) of s. 53. As to the service of notice on joint holders of a share and on the representatives of deceased or insolvent members, see sub-ss. (4) and (5) respectively of s. 53.

**460.** A document or proceeding requiring authentication by a company may be signed by a director, the managing agent, the secretaries and treasurers, the manager, the secretary or other authorised officer of the company, and *need not be under its common seal* (s. 54).

### Arbitration and Compromise.

**461.** A company can by written agreement refer an existing or a future dispute to arbitration under the Indian Arbitration Act, 1940. It can also delegate to the arbitrator power to settle any terms or to determine any matter which its directors or other managing body are entitled to settle or determine. In such arbitration the provisions of the Indian Arbitration Act, 1940 will apply (s. 389 and notes thereto).

**462.** It should be remembered in this connection that an award under the said Act is enforceable as a decree, and that no decree should be passed upon such an award, and if passed it would be without jurisdiction and a nullity (see notes to s. 389). As to the object of s. 389 and other matters see notes thereto.

### Carrying on Business with less than the Legal Minimum of Members.

**463.** A company must not carry on business for more than six months after the number of its members has been reduced to less than two in the case of a private company, and less than seven in the case of any other company. For the consequences of doing so see s. 45. It may also be wound up under s. 433 (d).

### Private Company.

**464.** A private company is almost on the same footing as a public company with the following differences :

(1) For forming a private company only two persons are necessary to subscribe the memorandum of association [s. 12 (1)]. As regards the memorandum of association there is no other difference between a public and a private company, than that the letter, where it is a limited company, will have to add "Private Limited" as the last words to its name [s. 13 (1) (a)].

(2) A private company by its articles restricts the right to transfer its shares [s. (3) (1) (iii) (a)]. Restrictions are usually placed on transfer of shares without first obtaining the approval of the directors, or transfer to outsiders without first offering them to the existing members at a price to be determined in accordance with the provisions therefor in the articles. This serves the double purpose of *first* ensuring the continuance of the private character of the company, and *secondly* of preventing an increase in the number of members.

(3) It must limit the number of its members to fifty exclusive of persons in the employment of the company or who have continued to be members after the employment ceased [S. 3 (1) (ii) (b)]. Therefore it is necessary to frame the articles so that by transfer of shares or otherwise the number of its members does not exceed fifty. The joint holders of a share or shares will be considered as a single member (*ibid*).

(4) A private company must by its articles [s. 3 (1) (iii) (c)] prohibit any invitation to the public to subscribe for any shares in or *debentures* of the company. Not only the shares but also the debentures of the company should never be offered to the public for subscription.

**464A.** In the case of a private company having a share capital, the articles must contain provisions relating to matters specified in sub-clauses (a), (b) and (c) of cl. (iii) of sub-s. (1) of s. 3, and in the case of any other private company, the articles must contain provisions relating to the matters specified in the said sub-clauses (b) and (c)—see sub-s. (3) of s. 27.

**464B. Privileges of private companies :—**As to these privileges a distinction has been made between a private company which is subsidiary to a public company and one which is not. For privileges etc. of these two classes see Notes 112 to 113 under s. 3.

**464C.** A private company must not allow the number of its members to fall below two [see ss. 45 and 433 (d)].

**464D.** If a private company fails to observe the above restrictions it will lose the privileges granted by the Act to these companies (see s. 43) and for commentary on s. 3 (1) (iii) see notes thereto.

**464E.** On account of the special privileges of a private company and also of the advantages of its distinct legal personality apart from its component members and of a limited liability without the apprehension of losing the private character, a large number of firms have been and are being converted into private limited companies. As to the agreement for sale of a business to a new private company see Form 4 in App. E, and for agreement by partners to convert the partnership business into a private company see Form 5 therein. For the form of the articles of association of a private limited company intended to be managed by the directors see form 67 in App. E.

*Further provisions regarding private companies.*

**464F.** A private company must send with the annual return, required by s. 159 a certificate signed both by a director and by the managing agent, secretaries and treasurers, manager or secretary of the company or where there is no managing agent, etc. by two directors, one of whom shall be the managing director, where there is one [s. 161 (1)]. It must also comply with the provisions of sub-s. (2) (b) of s. 161, namely, that the company has not, since the date of the last return or in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds 50, also a certificate so signed that the excess consists wholly of persons who under s. 3 (1) (iii) (b) are not to be included in reckoning the number of 50.

**464G.** S. 44 provides that if a company being a private company alters its articles in such manner that they no longer include the provisions of s. 3 (1) (iii), the company shall, as on the date of the alteration, cease to be a private company and shall, within 14 days after the said date, file with the Registrar a prospectus or a statement in lieu of prospectus containing matters specified in sub-s. (2) of s. 44. For details see sub-section (3).

**464H.** Where the articles of a private company include the above provisions, but default is made in complying with any of those provisions, the company will cease to be entitled to the privileges and exemptions conferred by the Act on private companies, and thereupon the provisions of the Act will apply to the company as if it were not a private company. Power has however been given to the Court for relieving a company from these consequences (see s. 43).

**464I.** The advantages of conversion of a private company into a public company is that the company can get additional capital by issuing its shares to the public and by raising money by the issue of its debentures to the public.

### Company Limited by Guarantee.

**464J.** A company limited by guarantee may or may not have a share capital. In the latter case in addition to the required particulars [see s. 13 (1) and (2)] the memorandum must state that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such sum as may be required not exceeding a specified amount [s. 13 (3)].

**465.** If the company has a share capital, the memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount; no subscriber of the memorandum can take less than one share, and each subscriber must write opposite to his name the number of shares he takes [s. 13 (4)].

**466.** Associations for mutual assurance and those mentioned in s. 25 are generally formed as companies limited by guarantee.

**467.** As to the form of the memorandum and articles of association of a company limited by guarantee and having a share capital see Table D in the First Schedule to the Act. For the memorandum and articles of such a company not having a share capital see Table C in the First Schedule and Form 12 in App. E. As to the fees for registering a company limited by guarantee see the Tenth Schedule to the Act and for stamp duty see App. F. As to such companies generally see s. 13 and notes thereto.

**468.** In the case of a company limited by guarantee and not having a share capital and registered after 1st April, 1914, the memorandum, the articles or a resolution of the company cannot give any person a right to participate in the divisible profits of the company otherwise

than as a member. If the memorandum or articles or any resolution of a company limited by guarantee and registered after 1st April, 1914, purport to divide the undertaking of the company into shares or interests, this will be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests are not specified by such memorandum, articles or resolution (s. 37).

**469.** A company limited by guarantee must register with its memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company. If the company has not a share capital, the articles must also state the number of members with which the company proposes to be registered (see s. 27).

**470.** As to the articles generally see notes to s. 26 and as to the alteration of articles, see s. 31 and notes thereto.

**471.** A company limited by guarantee may, if it has a share capital and is so authorized by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of the Act (see ss. 94 and 100). A company not having a share capital may, if so authorised by its articles, by ordinary resolution increase the number of its members [s. 97 (1)].

### **Unlimited Companies.**

**472.** Unlimited companies are rarely formed now-a-days. For definition of an unlimited company see s. 12 (2) (c). As to the contents of the memorandum of such a company see s. 12 (2) (c). As to the contents of the memorandum of such a company see s. 13 (1). For the form of memorandum and articles of an unlimited company having a share capital see Table E in Schedule I. See also N. 187.

**473.** An unlimited company must register, with its memorandum, articles signed by the subscribers to the memorandum, and if the company has a share capital, the articles must state the amount of share capital with which the company proposes to be registered. If it has not a share capital the articles must also state the number of members with which the company proposes to be registered (see ss. 26 and 27). As to the articles generally see notes to those sections and as to the alteration of the articles see s. 31 and notes thereto.

**474.** Any company registered as an unlimited company may register under the present Act as a limited company, but such registration will not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of the company before the registration and these debts &c. may be enforced in manner provided by Part IX of the present Act (s. 32).

**475.** An unlimited company having a share capital may, by its resolution for registration as a limited company, (a) increase the nominal amount of its share capital and (b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purpose of the company being wound up (see s. 98).

### **Reserve Liability of Limited Company.**

**476.** A limited company may by special resolution provide that any portion of its share capital not already called up shall not be capable

of being called up, except in the event and for the purpose of the company being wound up (see s. 99 and notes thereto).

*Companies for promotion of commerce, art, science, religion, charity etc.*

**477.** Where an association is about to be formed for the above purposes, and it intends to apply its profits or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Central Government may by licence direct the association to be registered as a company with limited liability without the addition to its name of the word "Limited" or "Private Limited" [sub-s. (1) of s. 25]. For detailed provisions, see sub-ss. (2) to (10) of that section.

For the regulations prescribed under sub-s. (5) of s. 25 regarding the issue of the licence, see the Companies Regulations, 1956 printed towards the end of Appendix B.

**478.** Any firm which stood registered at the commencement of the present Act as a member of any association or company licensed under the corresponding s. 26 of the previous Act shall be deemed to have been validly registered with effect on and from the date of its registration (s. 640).

**479.** Such an association may also be registered under the Societies Registration Act XXI of 1960 printed in Appendix J. In ss. 1 and 18 of that Act the words "registrar of joint stock companies" shall be construed to mean the Registrar under the Companies Act, 1956 (s. 650).

### **Existing Companies.**

**480.** For definition of an "existing company," see s. 3 (1) (ii). As to the application of the present Act to such companies, see ss. 561 to 564.

For the forms relating to the existing companies prescribed under ss. 565 to 569 see Forms 37 to 43 in Appendix B.

**481.** As to what the existing companies are to do under the present Act, see Table No. V infra.

### **Subsidiary Companies and Holding Companies.**

**482.** A company shall be deemed to be a *subsidiary* of another, if, but only if, (a) that other controls the composition of the Board of directors or (b) that other holds more than half the nominal value of its equity share capital; or (c) the first mentioned company is a subsidiary of any company which is that other's subsidiary [see s. 4 (1) and illustrations]. For explanations and exceptions, see sub-ss. (2) and (3) of s. 4.

**483.** A company shall be deemed to be the *holding* company of another if, but only if, that other is its subsidiary [s. 4 (4)].

**484.** In s. 4 the expression "company" includes any body corporate, and "equity share capital" has the same meaning as in s. 85 (2).

**485.** A body corporate cannot be a member of a holding company and any allotment or transfer of shares in a company to its subsidiary shall be void [s. 42 (1)]. For exception see s. 42 (2) and (3). See also sub-ss. (4) and (5) of s. 42.

**486.** Notwithstanding the provisions of s. 49 a company may hold any shares in its subsidiary in the name or names of any nominee or nominees of the company to ensure that the number of members of the subsidiary is not reduced below its minimum required by the Act—see s. 49 (3) and the rest of that section.

**487.** For restrictions on purchase or loans by company for purchase of its own or holding company's shares, see s. 77.

**488.** The balance-sheet of a holding company is to include certain particulars as to its subsidiaries. For details, see s. 212.

**489.** As to the financial year of holding and subsidiary companies see s. 213.

**490.** A holding company may, by resolution, authorise representatives to inspect the books of account kept by any of its subsidiaries [s. 214 (1)]. The rights conferred by s. 235 upon members relating to application by them for investigation of the company's affairs may be exercised, in respect of any subsidiary, by members of the holding company—see sub-s. (2) of s. 214.

**491.** As to the power of inspectors to carry investigation into the affairs of the company's subsidiary or holding company or a subsidiary or a subsidiary of its holding company or a holding company of its subsidiary, see s. 239.

**492.** For the prohibition of directors etc. from holding office or place of profit under any subsidiary of the company, unless the remuneration received from such subsidiary is paid over to the company or its holding company see s. 314 (1). As to the penalty for contravention, see s. 314 (2).

**493.** The prohibition of loans etc. by the managing agent to companies under the same management shall not apply to any loan made, guarantee given or security provided by a holding company to its subsidiary [s. 370 (2)].

**494.** The prohibition of purchase by a company of shares etc. of other companies in the same group shall not apply to investment by a holding company in its subsidiary [s. 372 (12) (c)].

**495.** A subsidiary company which is a private company is not entitled to most of the privileges and exemptions enjoyed by ordinary private companies [see under the heading *Private Companies*, *ante*].

### **Companies Authorised to be registered under the present Act.**

**496.** As to the companies authorized to be registered under the present Act, the requirements for and the mode of such registration and the effect of such registration see ss. 565 to 581. When a company is registered under these provisions all suits and other proceedings against it instituted before such registration will be allowed to proceed, but a decree or order passed therein will not be capable of execution against any individual member of the company, and in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company (s. 577). The provisions of the present Act in respect of staying and restraining

suits and legal proceedings upon the presentation of a winding up petition, and those in respect of commencement of and proceeding with suits and legal proceedings after the winding up order, will apply to such a company [see ss. 580 and 581].

### **Company Incorporated Outside India.**

#### *Establishment of Places of Business in India.*

**497.** SS. 592 to 602 shall apply to all foreign companies, as defined in s. 591. See that section.

**498.** For documents, etc., to be delivered to the Registrar by foreign companies carrying on business in India, see s. 592; and for returns to be submitted to the Registrar by such companies where documents etc. are altered, see s. 593.

**499.** As to the provision for making out and delivering to the Registrar balance-sheet, profit and loss account etc. in every calendar year by a foreign company, see s. 594.

For the forms of documents prescribed under ss. 592, 593 and 594, see Forms Nos. 44 to 54 in Appendix B.

**500.** For obligation to state in prospectus etc. the name of a foreign company, whether limited, and the country where it is incorporated, see s. 595.

**501.** As to the provision for service of any process, notice etc. on a foreign company, see s. 596.

**502.** All documents required to be delivered to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi and also to the Registrar of the State in which the principal place of business of the company is situate; and if any foreign company ceases to have a place of business in India, it shall, forthwith give notice of the fact to the Registrar—see s. 597.

**503.** For penalties for non-compliance with the foregoing provisions, see s. 598. But the company's failure to comply with provisions will not affect its liability under contracts etc. (s. 599).

**504.** As to the registration of charges, appointment of receiver and books of account, the provisions of ss. 124 to 145 shall apply—see s. 600.

For the forms of documents prescribed under s. 600, see Forms Nos. 55 to 60 in Appendix B.

**505.** As to the fees for registration of documents, see s. 601.

**506.** Interpretation of the words and expressions, such as "certified", "place of business" etc. has been given in s. 602.

#### *Prospectuses.*

**507.** As regards dating of prospectus and particulars to be contained therein, see the detailed provisions of s. 603. For provisions as to expert's consent and allotment of shares and debentures, see s. 604.

**508.** As to the registration of prospectus and penalty for contravention of ss. 603 to 605, see ss. 605 and 606 respectively.

**509.** Civil liability for misstatements in prospectus has been provided for in s. 607.

**510.** As to the interpretation of provisions regarding prospectuses, such as documents offering shares and debentures for subscription etc. see s. 608.

### **Compromise and Arrangement.**

**511.** S. 391 of the Act provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the Court may on the application of the company, or any creditor, member or liquidator of the company, order a meeting to be called, held and conducted in such manner as the Court directs. If a majority in number representing three-fourths in value of such creditors or members present in person *or by proxy* at the meeting agree to any compromise or arrangement, the same shall, if sanctioned by the Court, be binding on the creditors or members whose meeting was directed to be held and also on the company, and in the case of a company in the course of being wound up, on the liquidator and contributories.

**512.** This section is wide enough to include any reasonable compromise or arrangement and, as a matter of fact, advantage has been taken of this section to carry through schemes of the most varied character.

**513.** In this country, particularly in Bengal, on account of economic distress a large number of banks and loan companies which took deposits of money on condition to repay on demand, at a notice of a week, 6 months, a year or at most 2 or 3 years having no corresponding liquid assets, was unable to meet the demands of the depositors. They had largely taken and were taking advantage of this section. Most of them having adequate securities in landed properties, hoped to repay the depositors' money if they got sufficient time. For this purpose a scheme was prepared for sanction at a depositors' and creditors' meeting under which they agreed not to demand their dues (whether under judgment or not) for a certain number of years in which time the company undertook to pay them gradually and rateably as the company's dues from its debtors were realized. As regards management in the meantime, majority of the directors were elected under the scheme by the depositors and creditors and the directors again elected the managing directors and other executive authorities of the company and controlled them in the matter of realization and distribution of the moneys realized. The depositors and other creditors readily assented to the scheme as they had found by experience that they might get more in this way than by a compulsory liquidation, which, to say the least, was troublesome and expensive. It is not unlikely that in this country this alternative mode of liquidation will more and more appeal to the creditors of companies which cannot readily meet their obligations but can do so partly at least in course of a few years under the control of directors appointed by the creditors. It should be noted however that for this purpose sometimes it may be found necessary to alter the articles of association.

**514.** In this way within the time allotted in the scheme the assets of the company must be realized and distributed; but on the expiration



of the time mentioned above, or on the failure of the company to pay instalments provided in the scheme, the creditors will be at liberty to take whatever action they choose.

**515.** In England the commonest form of scheme is, as observed in Palmer's Company Law [13th edition at p. 463], that a new company is to be formed, that the debenture-holders of the existing company shall take in exchange debentures or preference shares of the new company and the unsecured creditors shall take a composition of so much in the pound payable partly in cash and partly in shares or debentures in the new company and that the shareholders receive only partly paid up shares in the new company.

**516.** As a matter of fact any scheme of reconstruction of a company, reorganization of its share capital or amalgamation with another company may be carried through under this section.

**517.** As to the principle on which the section is based, the Court's jurisdiction, what the Court will consider in sanctioning a scheme, meeting, voting and proxy &c. see notes to s. 391.

*Further provisions.*

**518.** An order made by the Court under sub-s. (2) of s. 391 sanctioning the scheme shall have no effect until a certified copy of the order has been filed with the Registrar, [sub-s. (3) of s. 391] and a copy of every such order must be annexed to every copy of memorandum of association issued after the order has been made [sub-s. (4) of s. 391]. For the consequences of default in complying with sub-s. (4) see sub-s. (5) of s. 391.

**519.** Power has been given to the Court to stay any suit or proceeding against the company pending an application under s. 391 [see sub-s. (6)]. A right of appeal has also been given from a decision of the Court [see sub-s. (7)].

**520.** For the purpose of ss. 391 and 393 unsecured creditors who may have filed suits or obtained decrees will be deemed to be of the same class as other unsecured creditors and "company" means any company liable to be wound up under the Act (s. 390).

**521.** The word "arrangement" in those sections includes a reorganization of share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods (see s. 390).

**522.** For detailed provisions regarding information to be supplied with every notice calling the meetings under s. 391 as to compromise with creditors and members see s. 393.

**523.** Reproducing ss. 208 and 209 of the English Act of 1948 the new ss. 394 and 395 have made detailed provisions for facilitating arrangements and reconstructions, amalgamations, compromises and arrangements and power has been given to acquire shares of dissenting shareholders in this connection.

**523A.** In s. 392 large powers have now been given to the High Court to supervise the carrying out of the compromise or arrangement and to modify the same, if necessary. See this section.

**524.** Power has been given in s. 396 to the Central Government to provide for amalgamation of companies in national interest. See that section.

### **Prevention of Oppression and Mismanagement.**

#### *A. Powers of Court.*

**525.** S. 397 provides for application to Court for relief in cases (a) where any member or members complain that the company's affairs are being conducted in a manner oppressive to such member or members; and (b) where to wind up the company would unfairly prejudice such member or members but otherwise there are just and equitable grounds therefor.

**526.** S. 398 provides for such application where any members complains (a) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company or (b) that material change has taken place in the management or control of the company or in the ownership of the company's share or in its membership; and that the Court may make such order on the application as it thinks fit.

**527.** For the members who shall have the right to apply under ss. 397 and 398, see s. 399.

**528.** The Court shall give notice of every such application to the Central Government and shall take into consideration the representations, if any, made to it by that Government (s. 400).

**529.** Power has been given in s. 401 to the Central Government to cause an application to be made to the Court for an order under s. 397 or s. 398.

**530.** As to the several matters which the Court can provide for, see s. 402. Under s. 403, the Court can pass an interim order. For the effect of alteration of the memorandum or articles of the company by order under s. 397 or s. 398, see s. 404.

**531.** The Court may order addition of respondents (such as managing agent etc.) to an application under s. 397 or s. 398 (s. 405).

**532.** In relation to an application under s. 397 or s. 398, ss. 539 to 544 shall apply in the form set forth in Schedule XI (s. 406).

**533.** For the consequences of termination or modification of an agreement such as is referred to in cl. (d) or (e) of s. 402, see s. 407.

#### *B. Powers of Central Government.*

**534.** The Central Government may appoint not more than two members as directors for a period not exceeding three years to prevent the affairs of the company being conducted oppressively to any members or prejudicially to the interests of the company [s. 408].

**535.** On a complaint by the managing director etc. that as a result of a change in the ownership of shares in the company, a change in the Board of directors is likely to take place which would affect prejudicially the affairs of the company, the Central Government may direct that no resolution passed or action taken to effect a change in the Board

of directors after the date of compliance shall take effect unless confirmed by the Central Government. The Central Government is empowered to make an interim order also. See s. 409 which will not however apply to a private company, unless it is a subsidiary of a public company.

### **Constitution and Powers of Advisory Committee.**

**536.** S. 410 empowers the Central Government to constitute an "Advisory Commission" whose duties will be to inquire into and advise the Central Government—(a) before a notification is issued under s. 324 on the necessity for and advisability of issuing the notification; (b) on applications made under ss. 259, 268, 269, 310, 311, 326, 328, 329, 332, 343, 345, 346, 352, 408 or 409 and (c) on all other matters which may be referred to the Commission by the Central Government—see s. 411.

**537.** As to the forms and procedure in cases referred to the Advisory Commission, see s. 412. For the purpose of making any inquiry under s. 411 the Advisory Commission will have powers mentioned in s. 413.

**538.** As to the penalties for refusal or neglect to produce books etc. before or to answer questions of the Advisory Commission, see s. 414.

**539.** S. 415 provides immunity for action taken by the Commission in good faith.

### **Miscellaneous Provisions.**

#### *Contracts where Company is Undisclosed Principal.*

**540.** Every managing agent, secretaries and treasurers, manager or other agent of a public company or a private company which is a subsidiary of a public company, who enters into a contract for or on behalf of the company in which the company is an undisclosed principal, must, at the time of entering into the contract, make a memorandum in writing of the terms etc. of the contract [s. 416(1)]. As to the obligation to deliver the memorandum to the company and to send copies thereof to each director and to lay the same at the next Board meeting see sub-s. (2) of s. 416. For consequences of default, see sub-s. (3) thereof.

#### *Employees' Securities and Provident Funds.*

**541.** All moneys or securities deposited with a company by its employees in pursuance of their contract of service must be deposited by the company in a special account in a Scheduled Bank [see 417(1) and (2)]. No portion of such moneys or securities can be utilised by the company except for the purposes agreed to in the contract of service [sub-s. (2) of s. 417].

**542.** As to the provisions applicable to the employees' provident funds, see the detailed provisions of s. 418.

**543.** An employee shall be entitled on request to the company or to the trustees referred to in sub-s. (4) of s. 418, to see the bank's receipt for any money or security referred to in ss. 417 and 418 (s. 419).

**544.** As to the penalty for contravention of ss. 417, 418 and 419, see s. 420.

### **Defunct Companies.**

**545.** There is a way in which a company's existence may inexpensively be brought to an end. S. 560 provides that if the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may proceed under this section and after complying with the provisions thereof strike its name off the register, and on the publication in the Official Gazette of a notice to that effect, the company will be dissolved. But the liability of every director and member of the company will continue and may be enforced as if the company had not been dissolved.

**546.** If the company or any member or creditor thereof feel aggrieved by the company having been struck off the register, the Court may, on application, order the name of the company to be restored to the register. See s. 560 and notes thereto.

**547.** When the directors or other authorities of a company find that on account of poor response of the investing public to take up its shares or for any other reason the company is unable to commence business, or on account of want of fund and inability to raise money it cannot carry on business and there are no assets of the company worth the name for distribution amongst the creditors and shareholders, all that they have to do is to inform the registrar that the company is *not in operation* or has ceased to carry on business and the Registrar will take necessary action.

### **Court having jurisdiction.**

**548.** Cl. (11) of s. 2 says that "the Court" means the Court having jurisdiction under the Act. S. 10 says that the Court having jurisdiction under the Act shall be the High Court having jurisdiction in the place at which the registered office is situate except to the extent to which jurisdiction has been conferred by the Central Government on any District Court subordinate to that High Court in pursuance of sub-s. (2) of s. 10, not being the jurisdiction conferred, (a) in respect of companies generally by ss. 237, 391, 394, 395 and 397 to 407, and (b) in respect of companies with paid up share capital of not less than Rs. 1,00,000, by Part VII (winding up) and other provisions of the Act relating to the winding up of companies [see sub-s. (2) of s. 10]. For the purposes of jurisdiction to wind up companies the expression "registered office" means the place which has longest been the registered office of the company during the 6 months immediately preceding the presentation of the petition for winding up [see sub-s. (3) of s. 10 and notes thereto]. Where the High Court makes an order for winding up a company, it may direct all subsequent proceedings to be had in a District Court [see s. 435]. The High Court has power to withdraw to itself or to transfer winding up proceedings from one District Court to another (s. 436).

### **Winding up.**

**549.** There are three modes of winding up a company, namely—(1) winding up by the Court otherwise called compulsory winding up, (2) voluntary winding up and (3) winding up subject to the supervision of the Court (s. 425). The voluntary winding up may be either the members' or the creditors' [see sub-s. (5) of s. 488].

## Winding Up by the Court.

### *Grounds.*

**550.** A company may be wound up by the Court for the following reasons :—

(1) If the company has passed a special resolution that the company be wound up by the Court. In such a case the directors are entitled to present the winding up petition in the name of the company. See s. 433 (a) and notes thereto. As to what is a special resolution see s. 189 and notes.

(2) If default is made in filing the statutory report or in holding the statutory meeting [s. 433 (b)]. Such a petition cannot be presented by any person except the Registrar or a contributory, nor before the expiration of 14 days after the last day on which the meeting ought to have been held [see s. 439 (7)]. If a petition is presented on this ground the Court may, instead of directing that the company be wound up, give direction for the statutory report to be filed or the meeting to be held, or make such other order as may be just and order the costs to be paid by any persons responsible for the default [s. 443 (3)].

(3) If the company does not commence business within a year from its incorporation, or suspends its business for a whole year [see s. 433 (c) and notes thereto]. It should be remembered that after allotment of shares a company is to apply to the Registrar of companies for certificate for commencement of business on compliance with the requirements of s. 149 (1) and (2), and the statutory meeting is to be held within 6 months from the date at which the company is entitled to commence business [s. 165 (1)]. So if a company delays in applying for the certificate for commencement of business for more than a year, it cannot be proceeded against under clause (b) of s. 433, but a petition for winding it up may be presented under clause (c) of s. 433.

(4) If the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven [see s. 433 (d) and notes thereto].

(5) If the company is unable to pay its debt [s. 433 (e)]. For cases where a company will be deemed to be unable to pay its debts—see s. 434 and notes thereto.

(6) If the Court is of opinion that it is just and equitable that the company should be wound up. See s. 433 (f) the terms of which are very wide. A company may be wound up under this clause where its substratum is gone, where it is a "bubble company", where there is a complete deadlock in its management, where it is formed to carry on an illegal business, where its object is fraudulent or where, the particular circumstances of a case require it [see notes to cl. (f) of s. 433].

### *Contributories.*

**551.** For the meaning of the term "contributory" see s. 428.

**552.** Sub-s. (1) of s. 429 provides that the liability of a contributory shall create a debt but payable at the time specified in the calls made on him by the liquidator.

**553.** No claim founded on the liability of a contributory will be cognizable by any Court of Small Causes outside the towns of Calcutta, Madras and Bombay [sub-s. (2) of s. 429].

**554.** If a contributory dies, his legal representatives will be liable to the extent of the estate of the deceased coming into their hands. For detailed provision, see s. 430.

**555.** Sub-s. (3) of s. 430 provides that for the purposes of that section the surviving co-parceners of a contributory who is a member of a Mitakshara joint Hindu family shall be deemed to be his legal representative.

**556.** As to contributories in the case of insolvency of a member, see s. 431.

**557.** Subject to the provisions of s. 426, in the winding up every present and past member of a company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves with the following qualifications :—

(1) A past member shall not be liable to contribute, if he has ceased to be a member for 1 year or upwards before the commencement of the winding up (for the dates of commencement of different kinds of winding up see notes to s. 441), nor in respect of debts or liabilities contracted after he had ceased to be a member. A past member will not also be made liable unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. So it is apprehended that if all the required contributions are realised from all the present members, but they do not satisfy the debts, liabilities, &c. mentioned above, still the past members will not be liable [see clauses (a) to (c) of sub-s. (1) of s. 426].

(2) Members, past or present, of companies limited by shares are liable to contribute only the amount unpaid on the shares and no more [see cl. (d) of sub-s. (1) of s. 426].

(3) Members of a company limited by guarantee are liable to contribute only up to the amount of their guarantee and no more [see cl. (c) of sub-s. (1) and sub-s. (2) of s. 426].

**558.** As to the saving of any provision in a policy of insurance see cl. (f) of sub-s. (1) of s. 426. As to the dividends etc. payable to a past and present member, see s. 426 (1) (g).

**559.** For the liability of directors managing agents, managers, etc. whose liability is unlimited see s. 427.

#### *Petition for winding up.*

**560.** A petition for winding up a company may be presented by the company itself, by any director or creditors including any contingent or prospective creditor, by any contributory or contributories, or by all or any of those parties, together or separately, or by the Registrar (see s. 439). In a case falling under s. 243 (on Inspector's report) the petition may be made by any person authorized by the Central Government [s. 439 (1) (f)].

**561.** As to who are the contributories and their liabilities see ss. 426 and 427 and notes thereto and ss. 430 to 432 and notes to those sections. A contributory is not entitled to present a winding up petition unless

(a) the number of members of the company is reduced, in the case of a private company, below 2, or, in the case of any other company, below 7, or (b) he is a registered holder of the share or shares for at least 6 months during the 18 months before the commencement of the winding up, or they have devolved on him through the death of a former holder [see s. 439 (4) and notes thereto]. A winding up by the Court commences at the time of presentation of the petition (s. 441).

**562.** As to the Registrar's right to present a petition for winding up, see sub-ss. (5) and (6) of s. 439.

**563.** A petition by a contingent or prospective creditor will not be heard until he has given security for costs and until a *prima facie* case for winding up has been established to the satisfaction of the Court and security for costs has been given [see s. 439 (8)]. As to which of the creditors can present a petition for winding up and which of them cannot, see notes to s. 439.

**564.** The Supreme Court has to make rules prescribing the mode of proceedings to be had for winding up a company in a High Court and the Courts subordinate thereto (see s. 643).

**565.** As to the right to present a winding up petition where the company is being wound up voluntarily or subject to the Court's supervision, see s. 440.

#### *Stay of proceedings against company.*

**566.** After the presentation of the winding up petition and before making an order for winding up, the Court may, upon application of the company or of any creditor or contributory, restrain further proceedings in any suit or proceeding against the company. The application is to be made, where the suit or proceeding is pending in the Supreme Court or High Court, to the Court where it is pending, and where it is pending in any other Court, to the Court having jurisdiction to wind up the company—see s. 442.

**567.** At any time after the presentation of a petition and before the making of an order for winding up, the Court may appoint the Official Liquidator a provisional liquidator but shall, before making any such appointment, give notice to the company [s. 450 (1) and (2)]. The Court may limit and restrict the powers of a provisional liquidator [s. 450 (3)].

#### *Hearing of the petition.*

**568.** On hearing the petition the Court may dismiss it with or without cost, adjourn the hearing, make any interim order or pass any other order : Provided that the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets [see s. 443 (1)].

**569.** Where a petition is made on the ground that it is just and equitable to wind up the company, the Court may refuse to make the winding up order, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy [s. 443 (2)].

**570.** Where the Court makes an order for the winding up of a company, it shall forthwith cause intimation thereof to be sent to the Official Liquidator (s. 444).

**571.** When an order has been made for winding up a company, the petitioner and the company must file with the Registrar of Companies a copy of the order within a month (see s. 445). Such order will be deemed to be notice of discharge to the servants of the company, except when its business is continued [s. 445 (3)]. A winding up order will operate in favour of all creditors and contributories of the company—see s. 447.

**572.** As soon as a winding up order has been made, the Official Liquidator automatically becomes liquidator of the company (s. 449). Where a winding up order has been made or where a provisional liquidator has been appointed, he shall take into his custody and control all the property, effects and actionable claims to which the company is or appears to be entitled. All these shall be deemed to be in the custody of the Court (s. 456).

*Transfer of winding up proceedings.*

**573.** Where a High Court makes a winding up order, it may direct all subsequent proceedings to be had in a District Court (s. 435). The High Court may withdraw the case from the District Court and proceed with the winding up itself, or transfer the case to some other District Court (s. 436).

*Stay of suits &c. against the company.*

**574.** When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding against the company can be commenced or proceeded with except by the leave of the winding-up Court. See s. 446 and notes thereto. The winding up Court shall have jurisdiction to entertain, or dispose of, any suit or proceeding by or against the company. Any such suit or proceeding which is pending in any Court other than the winding-up Court may be transferred to and disposed of by the winding up Court [sub-ss. (2) and (3) of s. 446]. In this connection see s. 537 where it has been provided that in the case of a winding-up by or subject to the supervision of the Court, any attachment, distress or execution put in force against or any sale held of the properties of the company without leave of the Court after the commencement of the winding up shall be void. But proceedings by the Government are saved.

*Stay of winding up proceedings.*

**575.** At any time after an order for winding up, on the application of the Official Liquidator or any creditor or contributory the Court can stay the winding up proceedings altogether or for a limited time on such terms and conditions as the Court thinks fit. See s. 466 and notes thereto.

*Wishes of creditors and contributories.*

**576.** In all matters relating to the winding up the Court may have regard to the wishes of the creditors and contributories proved to it by sufficient evidence; see s. 557 and notes thereto. For this purpose the Court may direct meetings of the creditors or contributories to be called and conducted in such manner as the Court directs, and may appoint



a person to act as chairman of the meeting and to report the result to the Court. In the case of creditors regard must be had to the value of each creditor's debt, and in the case of contributories regard is to be had to the number of votes each contributory is entitled to under the articles (see 557 and notes).

**577.** As to the stamp on a proxy paper at a creditors' or contributors' meetings see App. F.

*Official Liquidator.*

**578.** There shall be attached to each High Court an Official Liquidator appointed by the Central Government. The Official Receiver attached to a District Court for insolvency purposes, or if there is none, then such person as the Central Government may appoint for the purpose, shall be the Official Liquidator attached to the District Court (s. 448).

**579.** On a winding up order being made, the Official Liquidator shall become the liquidator of the company (s. 449). The liquidator shall perform such duties as the Court may impose. His acts shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification (s. 451). A liquidator shall be described by the style of "The Official Liquidator" of the company and not by his individual name (s. 452).

**580.** A Receiver cannot be appointed of assets in the hand of a liquidator except by or with the leave of the Court (s. 453).

**581.** For the powers of an official liquidator with the sanction of the Court see ss. 457 and notes thereto. The Court may however by order provide that the liquidator may exercise any of the powers referred to in s. 457 (1) without the sanction or intervention of the Court, but always subject to the control of the Court (s. 458).

**582.** The liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties (s. 459).

**583.** In the administration and distribution of the assets of the company the liquidator will have regard to any direction that may be given by resolutions of the creditors and contributories or by the committee of inspection, and any direction given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection (see s. 460). Subject as above the liquidator shall use his discretion thereon. The liquidator may summon general meetings of creditors or contributories for ascertaining their wishes, but will be *bound* to do so when directed by their resolution or requested in writing by not less than one-tenth in value of the creditors or contributories (see 460). If any person is aggrieved by any act or decision of the liquidator, he may apply to the Court for redress [s. 460 (6)]. The liquidator may himself apply to the Court for directions [s. 460 (4)]. But this should be done sparingly.

**584.** The liquidator must keep proper minute books of his proceedings and of such other matters as may be prescribed and any creditor or contributory may, subject to the control of the Court, inspect the same personally or by agent (s. 461).

*Other provisions regarding liquidators.*

**585.** The obligation to furnish information and explanation relating to documents submitted to the Registrar as provided in s. 234 applies *mutatis mutandis* to all liquidators also [see sub-s. (8) of s. 234].

**586.** S. 455 provides that the Official Liquidator shall, as soon as practicable, submit a preliminary report to the Court as to matters mentioned in sub-s. (1) of that section. The Official Liquidator may also make a further report or reports stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation or by any director or other officer of the company since the formation thereof [see sub-s. (2) of s. 455]. If he states in it that a fraud has been committed the Court shall have powers provided in s. 478 [see s. 455 (3)].

**587.** The liquidator must at least twice in each year at the prescribed times present to the Court an account of his receipts and payments [see sub-ss. (1) and (2) of s. 462]. As to the auditing of the accounts, see sub-ss. (3) to (5) of s. 462.

**588.** The Official Liquidator shall, in such manner and at such times as may be prescribed, pay the moneys received by him into the public account of India in the Reserve Bank of India (s. 552). He must not pay any moneys received by him in his capacity as liquidator into any private banking account (s. 554).

**589.** Where a company is being wound up if there are in the hands or control of the liquidator dividends or assets unclaimed or undistributed for six months, he must forthwith pay the same into the public account of India in the Reserve Bank of India. For detailed provisions see s. 555.

*Committee of Inspection.*

**590.** Provisions have been made in the Act for a committee of inspection, both in the winding up by the Court and creditors' voluntary winding up. See ss. 464-65 and 503 respectively.

**591.** By s. 464 it has been provided that the official liquidator must within 2 months from the date of the winding up order, convene a meeting of the creditors for the purpose of determining whether a committee of inspection should be appointed to act with the liquidator and who are to be the members thereof. The liquidator shall within 14 days from the date of the creditors' meeting, or such further time as the Court may grant, convene a meeting of the contributories to consider the decision of the creditors' meeting, and it shall be open to the meeting to accept the decision of the creditors' meeting with or without modification or to reject it. In the event of a disagreement between the resolutions of the two meetings the matter will be decided by the Court [see sub-s. (3) of s. 464]. As to the composition, rights, proceedings &c. of the committee of inspection s. 465.

**592.** In the administration of the assets of the company and in the distribution thereof among the creditors the Official Liquidator shall have regard to the directions given by resolutions of the meetings of creditors or contributories, or by the *committee of inspection* and in case of conflict the directions by the former will prevail [see sub-ss. (1) and (2) of s. 460].

**593.** As regards the summoning of the meetings of creditors and contributories, see sub-s. (3) of s. 460. The liquidator shall use his own discretion in the administration and distribution of the assets of the company [sub-s. (5)]. The liquidator may apply to the Court in the manner prescribed for direction regarding any particular matter arising in winding-up [sub-s. (4)]. Any person aggrieved by any act or decision of the liquidator may apply to the Court [sub-s. (6) of s. 460].

*Statement of affairs to the Official Liquidator.*

**594.** A statement of affairs of the company verified by an affidavit and containing the particulars mentioned in clauses (a) to (e) of sub-s. (1) of s. 454 is to be submitted to the Official Liquidator by persons who are mentioned in sub-s. (2) of that section. This is a very onerous duty cast upon the directors, managers and other officers etc. past or present, of the company in respect of which an order for winding up has been made, and should be carefully read.

*Report and Further Report of Official Liquidator.*

**595.** After receipt of the above statement the Official Liquidator must within the period mentioned in sub-s. (1) of s. 455 submit a preliminary report to the Court as to the matters specified in clauses (a) to (c) of that sub-section. He may also make a further report or reports stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in the liquidator's opinion it is desirable to bring to the notice of the Court (see s. 455).

**596.** If the Official Liquidator states in the further reports that a fraud has been committed as aforesaid, the Court shall have power to order public examination as provided in s. 478 [s. 455 (2) and (3)]

**Ordinary and Extraordinary Powers of Court.**

**597.** As to the general powers of the Court regarding settlement of list of contributories and application of assets of the company, delivery of property, payments of debts by contributories and the extent of set off, calls, proceedings for recovery thereof, payment into bank, exclusion of creditors not proving in time, adjustment of rights of contributories, and distribution of surplus assets, payment of costs and dissolution of the company see ss. 467 et seq. and notes to those sections.

*Private and public examinations.*

**598.** The Court has power for private examination to summon any officer of the company or any person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person who is deemed capable of giving information concerning the promotion, formation, trade, dealings, affairs, books or papers, or property of the company. The Court may also require him to produce any documents in his custody or power relating to the company. If any person summoned refuses to appear, the Court may cause him to be apprehended and brought before the Court for such examination. See s. 477.

599. On the report of the official liquidator that a fraud has been committed in the promotion or formation of the company the Court may direct any person who has taken part in the promotion or formation of the company, or has been a director, manager or other officer of the company, to attend before the Court for *public* examination regarding the promotion, formation or conduct of the business of the company or as to his conduct and dealings as director, manager or other officer of the company. For detailed provisions, see s. 478.

600. The Court has the further power to cause an absconding contributory to be arrested and his books, papers and movable properties to be seized (s. 479).

601. The above ordinary and extraordinary powers of the Court are in addition to any existing powers of instituting proceedings against any contributory or debtor of the company or his estate for the recovery of any call or other sums (s. 480).

### Enforcement of and Appeal from Orders.

602. As to the enforcement of the orders of the Court see ss. 482 and 634 and notes, and as to appeals from any order or decision in the matter of winding up of a company by the Court see s. 483 and notes thereto.

### Voluntary Winding up.

603. A company may under s. 484 be wound up voluntarily in the following ways:—

(1) by an *ordinary resolution* of the company requiring it to be wound up voluntarily *when*, (a) the period fixed for the duration of the company expires, or (b) the event occurs on the occurrence of which the articles provide that the company is to be dissolved;

(2) by a *special resolution* that the company be wound up voluntarily;

604. As to what is a *special resolution* and how it is to be passed see s. 189 and notes thereto.

605. As to the form of notice of a meeting to pass a special resolution to wind up voluntarily see Form 144 in App. E and for the form of notice to pass an ordinary resolution for that purpose, see Form No. 143 in App. E.

606. A voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntarily winding up (s. 486). The expression "resolution for voluntarily winding-up" means a resolution passed under sub-s. (1) of s. 484. See sub-s. (2) of that section. From that time the company must cease to carry on its business except so far as may be required for the beneficial winding up of the company. But the corporate state and corporate powers of the company will continue until it is dissolved (s. 487).

607. Within 14 days of the passing of any resolution for winding-up voluntarily the company must advertise the notice of such resolution as provided in s. 485 (1). As to the penalty for default on the part

of the company and its officers including the liquidator, see sub-s. (2) of s. 485. The form of such notice has been given in Form 145 in App. E.

*Provisions relating to voluntary winding-up.*

**608.** There are two kinds of voluntary winding-up—(1) a members' voluntary winding-up and (2) a creditors' voluntary winding-up.

*Declaration of solvency.*

**609.** Where it is proposed to wind up a company voluntarily, the directors or where there are more than two directors, the majority of them may, at their meeting make a declaration verified by an affidavit to the effect that upon making a full enquiry into the affairs of the company they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 3 years from the date of the passing of the resolution for winding up the company voluntarily, the winding-up will be a members' voluntary winding-up [s. 488 (1)]. Where such a declaration is made it will be a members' voluntary winding-up and where it is not made, the winding up will be a creditors' voluntary winding-up [see sub-s. (5) of s. 488].

**610.** The declaration must be made within 5 weeks immediately preceding the date of passing the resolution for winding up and be delivered to the Registrar for registration before that date. The declaration must also embody a statement of the company's assets and liabilities at the latest practicable date before the making of the declarations [see s. 488 (2)]. For consequences of failures to make good the declaration, see sub-ss. (3) and (4) of s. 488.

**611.** SS. 490 to 498 will, subject to s. 498 apply to a members' voluntary winding-up (s. 489).

*Members' voluntary winding-up.*

**612.** The company in general meeting shall appoint one or more liquidators and may fix their remuneration and any remuneration so fixed shall not be increased in any circumstances whatsoever (see s. 490). Before the remuneration is fixed, the liquidator shall not take charge of his office [s. 490 (3)]. On the appointment of a liquidator all the powers of the Board cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof (s. 491).

**613.** If a vacancy occurs in the office of liquidator the company in general meeting may, subject to any arrangement with the creditors, fill the vacancy (see s. 492).

**614.** The company must give notice to the Registrar of the appointments and vacancies in the office of liquidators within 10 days of the event [see s. 493 (1) and (2)]. As to the penalty for default, see sub-s. (3) of that section.

**615.** As to the power of the liquidator to accept shares &c. in consideration for the whole or part of the business or property of the company and the procedure for completing the transaction see s. 494 and notes thereto.

**616.** For the liquidator's duty to call creditors' meeting in case of insolvency of the company, see s. 495.

617. As to the duty of the liquidator to call a general meeting at the end of each year and of laying before the meeting an account of his acts and dealings and of the conduct of the winding-up see sub-s. (1) of s. 496. For the consequences of default see sub-s. (2) thereof.

618. As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding-up and call a general meeting for laying before it the account [sub-s. (1) of s. 497]. The meeting shall be called by advertisement [see sub-s. (2) of s. 497].

619. Within one week after the meeting the liquidator shall send to the Registrar a copy of the account and shall make a return to him of the holding of the meeting and in default he shall be liable to a penalty [see sub-ss. (3) and (4) of s. 497].

620. On the expiration of 3 months from the registration of the return the company will be deemed to be dissolved; but the Court may on the application of the liquidator or any interested person make an order deferring the date of dissolution [see sub-s. (5) of s. 497]. The person, on whose application such an order is made, must within 21 days of the order deliver to the Registrar a certified copy of the order and in default will be liable to a penalty [see sub-s. (6)].

621. If the liquidator fails to call the general meeting, he shall be punishable [sub-s. (7) of s. 497]. For the alternative provisions as to annual and final meetings in case of insolvency, see s. 498.

#### *Creditors' voluntary winding-up.*

622. SS. 500 to 509 shall apply to a creditors' voluntary winding-up (s. 499).

623. In the case of a creditors' voluntary winding-up the company is to cause a meeting of the creditors to be summoned for the day, or the day next following the day, on which there is to be held the general meeting of the company at which the resolution for voluntary winding-up is to be proposed, and shall cause notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of notices of the meeting of the company [s. 500 (1)]. As to the advertisement of the notice of the creditors meeting see sub-s. (2) of s. 500. As to the statement &c. to be laid before the meeting and the procedure thereat see sub-ss. (3), (4) and (5) of s. 500. For the consequences of contravention of the provisions thereof see sub-s. (6).

624. For the provision regarding notice of resolutions passed by the creditors' meeting to be given to the Registrar and the penalty for default, see s. 501.

625. The creditors and the company at their respective meetings mentioned in s. 500 may nominate a person to be liquidator, and if they nominate different persons the final decision will rest with the Court. As to detailed provision, see s. 502.

626. As to the appointment of a committee of inspection and the composition thereof see s. 503.

627. The committee of inspection, or if there is no such committee the creditors, may fix the remuneration of the liquidator, and where the remuneration is not so fixed, it will be determined by the Court. The remuneration so fixed cannot be increased in any circumstances (s. 504).

628. On the appointment of a liquidator all the powers of the Board of directors shall cease, except so far as the committee of inspection or the creditors sanction the continuance thereof (s. 505).

629. Any vacancy in the office of a liquidator other than a liquidator appointed by the Court may be filled by the creditors in their general meeting (s. 506).

630. S. 494 will apply to a creditors' voluntary winding up, but the power of liquidator to accept shares &c., in consideration for the whole or a part of the company's business or property mentioned in that section shall not be exercised except with the sanction of the Court or the committee of inspection (s. 507).

631. As to the duty of the liquidator to call meetings of the company and of the creditors at the end of each year and of laying before the meeting an account of the dealings and of the conduct of the winding-up, and the consequences of default, see s. 508.

632. The provisions for the final meeting and dissolution are similar to those in a members' voluntary winding-up mentioned above (see s. 509).

*Provisions applicable to every voluntary winding-up.*

633. SS. 511 to 521 shall apply to every kind of voluntary winding-up (s. 510). As to the distribution of the company's property see s. 511. For the powers and duties of a liquidator see s. 512.

634. A body corporate is prohibited from being appointed as a liquidator. For consequences of contravention of this provision, see s. 513. As to the punishment for corrupt inducement affecting appointment as a liquidator, see s. 514.

635. If from any cause whatever there is no liquidator acting the Court may appoint one. The Court may on cause shown remove a liquidator and appoint another in his place (s. 515).

636. The liquidator must, within 21 days after his appointment publish in the Official Gazette and deliver to the Registrar a notice of his appointment [see sub-s. (1) of s. 516]. For the consequences of default see sub-s. (2) of that section.

637. Any arrangement between a company about to be or in the course of being wound up and its creditors shall, subject to the right of appeal under sub-s. (2) of s. 517, be binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors [sub-s. (1) of s. 517]. Any creditor or contributory may within 3 weeks from the completion of the arrangement appeal to the Court against it, and the Court may amend, vary or confirm the arrangement [sub-s. (2) of s. 517].

638. As to the disposal of unclaimed funds and undistributed assets in the hands of a liquidator in a winding-up see s. 555.

639. Where a company finds it difficult to carry on its business on account of pressure from its creditors it may proceed under s. 391, s. 494, s. 507 or s. 517 if any satisfactory arrangement is possible.

*Power to apply to Court.*

**640.** The voluntary liquidator or any creditor or contributory of the company has the right to apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, the staying of proceedings or any other matters, all or any of the powers which the Court might exercise in a compulsory winding up [s. 518 (1)].

**641.** The liquidator or any contributory or creditor may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding-up, *i.e.*, after the resolution for voluntary winding-up is passed. Such application shall be made—(a) if the attachment &c. are put into force by a High Court, to such High Court; (b) if the attachment &c. are put into force by any other Court, then to the Court having jurisdiction to wind up the company [see sub-ss. (2) and (3) of s. 518].

**642.** Under the powers conferred by s. 518 the Court can stay suits and proceedings against the company and order delivery of books and examination of persons. In short it will exercise all the powers exercisable in a compulsory winding up if it thinks that such exercise of power will be just and beneficial (see s. 518 and notes thereto). A copy of the order staying the proceedings in the winding up shall forthwith be forwarded by the company to the Registrar [see sub-s. (5) of s. 518].

**Public Examination of Promoters, Directors, etc.**

**642A.** In s. 519 provisions similar to s. 478 have been made for public examinations of promoters, directors, etc. in a voluntary winding up. See s. 519.

*Other provisions.*

**643.** All costs, charges and expenses properly incurred in the voluntary winding up including the liquidator's remuneration are, subject to the rights of the secured creditors, if any, payable out of the assets in priority to all other claims. See s. 520 and notes thereto.

**644.** As to the rights of creditors and contributories to have the company wound up by the Court (but the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up) see s. 521 and notes thereto.

**Winding up subject to Supervision of Court.**

**645.** At any time after a company has by *resolution* resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to the supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just (s. 522). A petition therefor will, for the purpose of giving jurisdiction to the Court over suits and legal proceedings, be deemed to be a petition for winding up by the Court (s. 523).

**646.** In deciding between a winding up by the Court and that subject to its supervision, and in all matters, the Court may have regard



to the wishes of the creditors or contributories as proved to it by any sufficient evidence (s. 557).

**647.** As to the appointment of a liquidator or an additional liquidator, the removal of a liquidator and the filling of vacancy see s. 524.

**648.** The powers and obligations of a liquidator appointed by the Court under s. 524 shall be the same as of liquidators in a voluntary winding up (s. 525).

**649.** In a winding up under supervision of the Court the liquidator may, subject to any restriction imposed by the Court, exercise all its powers, without the sanction or intervention of the Court, as if the company were being wound up altogether voluntarily [s. 526 (1)]. Except as provided in sub-s. (1) of s. 526 an order passed under s. 522 will, for all purposes including the staying of suits &c., be deemed to be an order of the Court for winding up the company by the Court. See sub-ss. (2) and (3) of s. 526.

**650.** Where after a supervision order, an order for winding up by the Court is made, the Court may appoint any person or persons who are then liquidators, to be liquidator or liquidators in the winding up by the Court in addition to, and subject to the control of, the Official Liquidator—see s. 527.

### **General Provisions in every Mode of Winding up.**

**651.** In the case of a voluntary winding up any transfer of shares without the liquidator's sanction, and any alteration of status of the members made after the commencement of the winding up shall be void [s. 536 (1)]. In the case of a winding-up by or subject to the supervision of the Court every disposition of property (including actionable claims) of the company, and every transfer of shares or alteration in the status of the members made after the commencement of the winding up shall, unless the Court otherwise orders, be void [s. 536 (2)].

In a winding up all debts and claims, present or future, certain or contingent will be admissible to proof (see s. 528 and notes). But in the case of an insolvent company the law of insolvency and rules thereunder will apply. See s. 528 and notes thereto. For the application of insolvency rules in winding up of insolvent companies, see s. 529 and notes thereto.

**652.** As to the debts which are payable in priority to all other debts see the detailed provisions of s. 530 and notes thereto. As to fraudulent preferences by any transfer, delivery of goods, payment, execution &c. see s. 531 and notes thereto.

**653.** For the liabilities and rights of certain fraudulently preferred persons, see s. 533.

**654.** Where any company is being wound up by or subject to the supervision of the Court any attachment, distress or execution put in force or any sale of properties held without leave of the Court in respect of the estate or effects of the company after the commencement of the winding up will be void. But this will not affect any proceedings by the Government. See s. 537 and notes.

**655.** Transfers by a company for the benefit of all the creditors shall be void (s. 532).

As to the effect of the commencement of winding up of a company upon a floating charge created by it within 12 months see s. 534 and notes.

**656.** It has been provided in s. 535 that the liquidator will be able with the leave of the Court to disclaim any property of the company burdended with onerous covenants notwithstanding that he has endeavoured to sell or has taken possession of the same or exercised any act of ownership in respect thereto. For the detailed provisions read s. 535.

*Compromise and arrangement.*

**657.** With the sanction of the Court the liquidator may, when the company is being wound up by or subject to the supervision of the Court and with the sanction of a special resolution of the company in the case of a voluntary winding up, (i) pay any classes of creditors in full; (ii) make any compromise or arrangements with the creditors; and (iii) compromise all calls, liabilities to calls, debts &c., in such terms as may be agreed upon (see s. 546 and notes).

**658.** In the case of a voluntary winding up the exercise by the liquidator of the powers conferred by s. 543 (1) shall be subject to the control of the Court [s. 546 (2)]. Any creditor or contributory may apply to the Court in respect of any exercise or proposed exercise of any such power [s. 546 (3)].

*Misfeasance proceedings.*

**659.** Where in the course of winding up of a company it appears that any promoter or any past or present director, managing agent, manager, secretaries and treasurers, liquidator or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust, the Court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the aforesaid persons and compel them to repay or restore the money or property with interest or to contribute such sum by way of compensation as the Court thinks fit. See s. 543 and notes thereto.

**660.** An application for misfeasance is to be made within 5 years from the date of the winding-up order or of the first appointment of a liquidator or of the misapplication &c. mentioned in the section, whichever is longer [see sub-s. (2) of s. 543].

*Prosecution for Offences Antecedent to or in Course of Winding up.*

**661.** If with intent to defraud or deceive any person, any officer or contributory of a company which is being wound up, destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register, book or document of the company, he shall be liable to imprisonment for a term which may extend to 7 years and shall also be liable to fine (s. 539).

**662.** A machinery has been provided in s. 545 for the prosecution of officers or members (past or present) of a company, if it appears to the Court in a winding up by or subject to the supervision of Court or to a voluntary liquidator that the aforesaid persons have been guilty of

any offence in relation to the company. For details of the procedure see s. 545.

**663.** A large number of offences have been mentioned in s. 538 and heavy punishments have been provided therefor. If any person being a past or present officer of a company which at the time of the commission of the alleged offences is being wound up in any of the modes or is subsequently so wound up does or fails to do any of the acts mentioned in clauses (a) to (p) of sub-s. (1) of s. 538, he shall be punishable. Where any person pawns or pledges or disposes of any property in circumstances which amount to an offence under cl. (o) of the subsection referred to above, every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned in such circumstances as mentioned in cl. (a) shall be punishable with imprisonment for a term which may extend to 3 years or with fine, or with both [sub-s. (2) of s. 538]. For details read that section.

**664** As to the penalty for frauds committed by officers of a company which subsequently goes into liquidation, see s. 540.

**665.** For detailed provisions regarding liability where proper accounts are not kept, see s. 541 and as to those for the liability for fraudulent conduct of business, see s. 542. The liabilities under this section as well as under s. 543 (misfeasance) extend to the partners or directors in the firm or the company (see s. 544).

#### *Evidence, inspection and disposal of documents.*

**666.** In a winding up all books and papers of the company and of the liquidators are *prima facie* evidence as between the contributories (s. 548).

**667.** After an order for a winding up by or subject to the supervision of the Court, the Court may make orders for inspection by *creditors and contributories* only of the books and papers of the company (see s. 549). As to the disposal of the books and papers of a company which has been wound up see s. 550. After 5 years from the date of dissolution of a company no responsibility will rest on the company or the liquidator or any person to whom the custody of any books and papers has been committed by reason of the same not being forthcoming [sub-s. (2) of s. 550].

**667A.** As to the power of the Central Government to make Rules under this section regarding matters mentioned in cls. (a) and (b) of sub-s (3) of s. 550, see that subsection. For such Rules, see Appendix B (towards its beginning), Rule No. 15. For the consequence of contravention of these Rules, see sub-s. (4) of s. 550.

#### *Miscellaneous Provisions.*

**668.** Where a company is being wound up by or under supervision of the Court or voluntarily, every invoice, order for goods or business letter issued by or on behalf of the company or by the liquidator or receiver or manager of the company's property, being a document on which the company's name appears must contain a statement that the company is being wound up [s. 547(1)]. For consequences of default, see sub-s. (2) of that section.

**669.** As to the information regarding pending liquidations to be sent to the Court in the case of a winding up by or subject to the supervision of the Court or to the Registrar in the case of a voluntary winding up, see the provisions of s. 551.

**670.** For the Official Liquidator's duty to make payments of moneys received by him into the public account of India, see s. 552. The other liquidators must make such payments into Scheduled Banks. For details, see s. 553. No liquidator can pay moneys received by him as liquidator into any private account (s. 554).

**671.** Unclaimed dividends and undistributed assets are to be paid by the liquidator into the "Companies Liquidation Account" in the Reserve Bank of India. For details see s. 555.

**672.** As to the enforcement by the Court of a liquidator's duty to make returns etc. on an application by any creditor, contributory or the Registrar, see s. 556.

**673.** As to the saving of pending proceedings for winding up at the commencement of the present Act, see s. 647; and for the saving of prosecutions instituted by the liquidator or the Court under s. 237 of the previous Companies Act of 1913, see s. 648.

#### *Supplementary Powers of Court.*

**674.** In all matters relating to the winding up of a company the Court may have regard to the wishes of creditors or contributories as proved by sufficient evidence and may direct their meetings to be called and held in such manner as the Court directs (see s. 557).

**675.** As to the Court or person before whom affidavits may be sworn, see s. 558.

#### *Provisions as to Dissolution.*

**676.** Where a company has been dissolved, whether in pursuance of Part VII of the Act or s. 394, or otherwise, the Court may within 2 years of the date of dissolution, on application by a party interested make an order declaring the dissolution to have been void, and thereupon proceedings may be taken as if the company had not been dissolved [s. 559 (1)].

**677.** It shall be the applicant's duty within 21 days after the order, or such further time as the Court may allow, to file a certified copy of the order with the Registrar. For consequences of default, see sub-s. (2) of s. 559.

#### **Winding up of Unregistered Companies.**

**678.** For the meaning of "unregistered company" see s. 582.

**679.** An unregistered company may be wound up under the present Act. All the provisions of this Act with respect to winding up will apply to an unregistered company with the exceptions and additions mentioned in sub-ss. (2) to (5) of s. 583 [sub-s. (1) of s. 583].

**680.** Any partnership, association or company consisting of *more than 7* members may be wound up under the provisions of Part X [see s. 582, cl. (b)].

**681.** It has been provided by s. 584 that where a company incorporated outside India ceases to carry on business in this country it may be wound up as an unregistered company under Part X, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated (see notes to s. 584).

**682.** As to who are contributories in the winding up and their liability etc. see s. 585. For the power to stay or restrain, suits and legal proceedings against such a company after the presentation of petition for winding up, as well as after the winding up order, see s. 586 and s. 587 respectively.

**683.** As regards the vesting of property of such a company in the liquidator and powers exercisable by the latter, see s. 588. For other provisions relating to the winding up of an unregistered company see ss. 589 and 590.

### **Application of Act to Companies formed or Registered under Previous Companies Laws.**

**684.** As to the provision for application of the present Act to companies *formed and registered under* previous companies laws, see s. 561. For application thereof to companies *registered but not formed* under the previous companies laws, see s. 562.

**685.** As to the application of the present Act to unlimited companies re-registered under the previous companies laws, see s. 563.

**686.** For the mode of transferring shares in the case of companies registered under Act XIX of 1857 and Act VII of 1860, see s. 564.

### **Companies Authorised to be Registered under this Act.**

**687.** For the detailed provisions regarding companies capable of being registered under the present Act, see s. 565.

**688.** For the requirements for registration of "joint-stock companies" under Part IX see s. 567. The expression "joint-stock companies" has been defined in s. 566.

**689.** As to the requirements for registration of companies not being "joint-stock companies", see s. 568.

**690.** The Registrar has power to require evidence as to the nature of the company proposing to be registered under Part IX (s. 570). As to the authentication of statements of existing companies, see s. 569.

**690A.** As to the form relating to the existing companies under ss. 565 to 569, see Forms Nos. 37 to 43 in Appendix B.

**691.** On the registration of a banking company with limited liability under Part IX notice is to be given to its customers—see s. 571.

**692.** As to the change of name of a company seeking to be registered under Part IX for purpose of registration, see s. 572. When a company registers in pursuance of this Part with limited liability the word or words "Limited" or "Private Limited" as the case may be, shall form and be registered as the last word or words of its name (see s. 573).

**693.** As to the certificate of registration to be granted by the Registrar and vesting of property on registration see s. 574 and s. 575 respectively. The registration will not however affect the existing rights and liabilities of the company (s. 576). The pending legal proceedings will also continue, but execution will not issue against the property or person of any individual member, unless the property of the company is found insufficient, in which case an order may be obtained for winding up the company (s. 577).

**694.** For the detailed provision regarding the effect of registration under Part IX, see s. 578.

**695.** A company registered under this Part may by special resolution substitute a memorandum and articles for a deed of settlement [s. 579 (1)]. As to the provision for alteration of the objects of the company see sub-ss. (2) and (3) of s. 579.

**696.** For power of the Court to stay or restrain proceedings against the company see s. 580. On the making of a winding-up order or on the appointment of a provisional liquidator no suit or other legal proceeding against the company can be proceeded with except with the leave of the Court—See s. 581.

### **Foreign Companies—Companies Incorporated Outside India.**

**697.** SS. 592 to 602 shall apply to all foreign companies (a) which after the commencement of this Act establish a place of business within India and (b) which have before such commencement established a place of business within India and continue to have the same at the commencement of this Act (see s. 591).

**698.** As to the documents etc. to be delivered to the Registrar by these two classes of foreign companies carrying on business in India see s. 592. For provisions regarding return to be delivered to the Registrar by foreign companies where the aforesaid documents etc. are altered, see s. 593.

**698A.** For the forms relating to foreign companies under ss. 592 to 594, see Forms Nos. 44 to 54 in Appendix B.

**699.** As to the obligation of a foreign company to state its name, where limited and the country where it was incorporated, etc. see s. 595. For provisions regarding service of any process, notice etc. on a foreign company, see s. 596.

**700.** For obligation of a foreign company to make out balance-sheet and profit and loss account etc. and delivery thereof to the Registrar, see s. 594. For the office where such documents are to be filed, see s. 597. If any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar [s. 597 (3)].

**701.** As to the penalty for failure to comply with any of the foregoing provisions, see s. 598. But such failure will not affect the company's liability under contracts etc. (s. 599).

**702.** For provisions regarding registration of charges, appointment of receiver and books of account, see s. 600. For the forms of particulars of charges etc. under s. 600 read with ss. 125, 127, 128 and 129, 135 and 138, see Forms Nos. 55, 56, 57, 58, 59 and 60 respectively in Appendix B.

**703.** As to the fees to be paid to the Registrar for registration of any document required by the foregoing provisions of Part XI, see s. 601.

**704.** Interpretation of the expression "certified", "director", "place of business" "prospectus" and "secretary" used in this Part has been given in s. 602.

#### *Prospectuses.*

**705.** As to the dating of prospectus and particulars to be contained therein see the detailed provisions contained in s. 603; and as to the provisions relating to expert's consent and allotment of shares and debentures, see s. 604.

**706.** For the provisions regarding the registration of prospectus, see s. 605 and as to the penalty for contravention of ss. 603 to 605, see s. 606. For the civil liability for mis-statement in prospectus, see s. 607.

**707.** Interpretation of provisions as to prospectuses has been given in s. 608.

#### **Registration Offices, and Officers and Fees.**

**708.** As to the establishment and continuance of registration offices etc. by the Central Government, see s. 609.

**709.** For the inspection, production and evidence of documents kept by the Registrar, see s. 610.

**710.** Fees specified in Schedule X shall be paid to the Registrar (s. 611). All fees, charges etc. paid to any Registrar or other officer of the Central Government shall be paid into the public account in the Reserve Bank of India (s. 612). The Central Government has power to reduce the fees, charges etc. (s. 613).

**711.** As to the enforcement by the Court of the company's duty to make returns etc. to the Registrar, see s. 614.

#### **GENERAL.**

##### *Collection of information and statistics from companies.*

**712.** The Central Government may, by order, require companies generally, or any class of companies, or any company to furnish such information or statistics with regard to their or its constitution or working, and within such time as may be specified in the order. For details see s. 615.

#### **Application of Act to Companies Governed by Special Acts.**

**713.** As to the application of this Act to insurance, banking, electricity supply and other companies governed by special Acts, see s. 616.

#### **Application of Act to Government Companies.**

**714.** For the purposes of ss. 618 to 620 "Government company" means any company in which not less than 51 per cent. of the share capital is held by the Central Government or by any State Government or Governments, or partly by the one or partly by the other (see s. 617).

**715.** A Government company formed after the commencement of this Act is prohibited from appointing a managing agent (s. 618).

**716.** The provisions specified in sub-ss. (2) to (4) of s. 619 shall apply to a Government company notwithstanding those in ss. 224 to 233 [s. 619 (1)].

**717.** In s. 620 power has been given to the Central Government by notification to modify the present Act in its application to Government Companies.

### **Offences.**

**718.** Except the proceedings instituted under s. 545 (prosecution of delinquent officers and members), offences against this Act are to be taken cognizance of by Courts only on the complaint of the Registrar, a shareholder or the Central Government : provided that this shall not apply to a prosecution by a company of any of its officers (s. 621). The action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any matters included in Part VII (ss. 425 to 560) or relating to the winding up of companies are excepted [see sub-ss. (2) and (3) of s. 621].

**719.** Offences under this Act are non-cognizable (s. 624).

**720.** No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act (s. 622). Any offence punishable with fine only committed within a Presidency-town may be tried summarily by a Presidency Magistrate (s. 623).

**721.** For detailed provisions regarding payment of compensation in cases of frivolous or vexatious prosecution, see s. 625.

**722.** As to the application of fines imposed by a Court under this Act, see s. 626.

**723.** For the provisions regarding production and inspection of books where the commission of an offence is suspected, see s. 627.

**724.** As to the penalty for false statements in any return, report, certificate, balance-sheet, prospectus, etc., see s. 628. For the penalty for false evidence given in any examination, solemn affirmation, affidavit etc., see s. 629.

**725.** As to the penalty for wrongful withholding of a company's property, see s. 630.

**726.** For the penalty for improper use of words "Limited" or "Private Limited", see s. 631.

### **Legal Proceedings.**

**727.** Where a limited company is plaintiff or petitioner in a suit or other legal proceeding, any Court having jurisdiction in the matter may require it to give security for costs (s. 632).

**728.** If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, if the Court hearing the case thinks that he is or may be liable, but has acted honestly and reasonably, it may relieve him wholly or partly [s. 633 (1)].



Where any such officer has reason to apprehend that any such claim may be made against him he may apply to the Court for relief—see sub-s. (2) of s. 633.

**729** Any order made by a Court under this Act may be enforced in the same manner as a decree made by the Court (s. 634).

*Reduction of Fees Payable to Company.*

**730** In s. 636 power has been given to companies to reduce fees, charges etc. payable to them. Any reduction so made may at any time be cancelled or varied by them.

*Delegation of Powers and Functions of Central Government.*

**731.** The Central Government by notification in the Official Gazette delegate any of its powers or functions under this Act except those specified in sub-s. (2) of s. 637 to such authority or officer as may be specified in the notification—see s. 637.

**Schedules, Forms and Rules.**

**732.** The Central Government may, by notification in the Official Gazette, alter any regulations, rules, tables, forms and other provisions contained in any of the Schedules to the Act, except Schedule XI (relating to prevention of oppression to a member or members, and mismanagement of companies) and Schedule XII (relating to repeals)—see s. 641.

**733** In addition to the powers conferred by s. 641 the Central Government may, by notification in the Official Gazette, make rules for matters which by this Act are to be, or may be, prescribed by the Central Government—see s. 642.

**734.** For the rules to be made by the Supreme Court after consulting the High Courts in respect of matters specified in s. 643, see that section. Until rules are made by the Supreme Court as aforesaid, all rules made by the High Courts on the aforesaid matters and in force at the commencement of this Act shall continue to be in force so far as they are not inconsistent with the provisions of this Act [s. 643 (3)].

**Repeals and Savings.**

**735.** For the repeal of Acts specified in Schedule XII and saving of orders, rules etc., in force at the commencement of this Act, see ss. 644 and 645 respectively.

**736.** As regards the saving of operation of s. 138 of Act VII of 1913, see s. 646.

**737.** Pending proceedings for winding up are saved by s. 647, except that sub-s. (7) of s. 555 shall apply in respect of moneys paid into the Companies Liquidation Account.

**738.** Prosecutions instituted by a liquidator or Court under s. 237 of Act VII of 1913 are saved by s. 648.

**739.** Any document referring to any former enactment shall be construed as referring to the corresponding enactment of this Act (s. 649).

740. Any reference to an *extraordinary resolution* in the articles, etc., or in any law in force at the commencement of this Act shall be construed as a reference to a special resolution (s. 651).

741. Appointments made under previous company laws shall have effect as if made under this Act (s. 652).

742. The former registration offices shall be continued (s. 653).

743. Registers under the previous companies laws shall be deemed to be part of registers under this Act (s. 654).

744. Funds and accounts under this Act shall be deemed to be in continuation of those under the previous companies laws (s. 655).

745. Nothing in this Act shall affect the incorporation of any company registered under any enactment repealed by this Act (s. 656).

746. As regards the saving of certain Tables of the previous Companies Acts see s. 657.

747. The mention of particular matters in ss. 636 to 648 or in any other provision of this Act shall not prejudice the general application of s. 6 of the General Clauses Act, 1897, with respect to the effect of repeals (s. 658).

748. In the case of a company limited by shares, if articles are not registered or if articles are registered, in so far as they do not exclude or modify the regulations in Table A, those regulations shall, so far as applicable, be the regulations of the company (see s. 28). As regards the provisions of Table A, see those regulations and notes thereunder.

749. For the stamp duty on affidavit, agreement, articles of association, share certificate, copy or extract, debenture, bond, conveyance, indemnity bond, allotment letter, memorandum of association, proxy, security bond, share warrants to bearer and transfer of shares and debentures, see App. F.

### **Capital Issues (Control) Act XXIX of 1947.**

750. The above mentioned Act with the relevant Rules, Exemption Orders etc. has been printed in App. G.

### **Registers and Books.**

751. A list of the registers &c. required to be kept at the registered office (or elsewhere) of a company has been given in Table No. XVII.

*Documents &c. required to be filed with the Registrar.*

752. These have been given in Table No. XIX.

### **Offences under the Act.**

753. A list of offences, offenders and maximum punishments provided in the Act has been given in Table No. XXIV.

For other useful Tables, see the remaining Tables printed *infra*.

**TABLE NO. I**  
**CORRESPONDING SECTIONS OF COMPANIES ACTS**

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
1	1	462	2 (45)	—	—
2	2 (1)	455 (1)	2 (46)	2 (1) (16)	455 (1)
2 (1)	—	—	2 (47)	2 (2)	455 (1), 154
2 (2)	2 (1) (1)	455 (1)	2 (48)	—	—
2 (3)	—	—	2 (49)	2 (1) (17)	—
2 (4)	—	—	2 (50)	—	—
2 (5)	—	—	3 (1) (i)	2 (1) (2)	455 (1)
2 (6)	—	—	3 (1) (ii)	2 (1) (7)	455 (1)
2 (7)	—	455 (3)	3 (1) (iii)	2 (1) (13)	28
2 (8)	—	455 (1)	3 (1) (iv)	2 (1) (13A)	—
2 (9)	—	—	3 (2)	2A	—
2 (10)	2 (1) (2)	455 (1)	4	2 (2)	455 (1), 154
2 (11)	2 (1) (3)	455 (1)	5	—	440 (2)
2 (12)	2 (1) (4)	455 (1)	6	—	—
2 (13)	2 (1) (5)	455 (1)	7	—	455 (2)
2 (14)	2 (1) (6)	—	8	—	—
2 (15)	—	455 (1)	9	—	—
2 (16)	2 (1) (7)	455 (1)	10	3	218, 220
2 (17)	—	455 (1)	11	4	429, 434 (1)
2 (18)	—	—	12	5	1
2 (19)	2 (2)	455 (1), 154	13	6, 7, 8	2
2 (20)	—	—	14	151 (1)	11
2 (21)	2 (1) (8)	—	15	9	3
2 (22)	—	455 (1)	16	10	4
2 (23)	—	—	17	12, 13, 14	5 (1) to (6)
2 (24)	2 (1) (9)	—	18	15	5 (7)
2 (25)	2 (1) (9A)	—	19	16	5 (8)
2 (26)	—	—	20	11 (1), (3)	17
2 (27)	—	—	21	11 (4)	18 (1)
2 (28)	2 (1) (10)	455 (1)	22	11 (2)	18 (2)
2 (29)	2 (1) (11)	455 (1)	23	11 (5),	18 (3), (4)
2 (30)	—	—	24	—	—
2 (31)	—	—	25	26	19
2 (32)	—	—	26	17 (1)	6
2 (33)	2 (1) (12)	455 (1)	27	17 (3), (4)	7
2 (34)	—	—	28	18	8
2 (35)	2 (1) (13)	455 (1)	29	151 (1)	11
2 (36)	2 (1) (14)	455 (1)	30	19	9
2 (37)	2 (1) (13A)	—	31	20	10
2 (38)	—	—	32	67	16
2 (39)	—	455 (1)	33	22, 24 (2)	12, 15 (2)
2 (40)	2 (1) (15)	455 (1)	34	23	13
2 (41)	—	—	35	24 (1)	15 (1)
2 (42)	—	—	36	21	20
2 (43)	—	—			
2 (44)	—	—			

TABLE NO. I

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Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1956
37	27	21	80	105B & Reg. 3 of Table A	58
38	20A	22			
39	25	24			
40	25A	—	81	105C	—
41	30	26	82	28 (1)	73
42	—	27	83	28 (2)	74
43	154 (3)	29	84	29	81
44	154 (1), (2)	30	85	—	—
45	147	31	86	—	—
46	88	32	87	—	—
47	89	33	88	—	—
48	90	34	89	—	—
49	—	—	90	—	—
50	91	35	91	—	—
51	148	437	92	49 (2)	59 (b)
52	149	—	93	49 (3)	59 (c)
53	Regs. 112 to 115, Table A	—	94	50, 66	61
			95	51	62
54	150	36	96	52	—
55	92 (1)	37	97	53	63
56	93	38	98	68	64
57	—	—	99	69	60
58	—	40 (1)	100	55	66
59	92 (5), 100 (5) (b)	40 (2), (3)	101	56, 58, 59	67
	92 (2) to (5)		102	57, 60, 65	68
60	92 (2) to (5)	41	103	61, 62	69
61	99	42	104	63	70
62	100	43	105	64	71
63	—(See 97)	44	106	66A	72
64	98A	45	107	66A	72
65	—	46	108	34 (3)	75
66	93 (2)	—	109	35	76
67	—	55	110	34 (1), (2)	—
68	—	—	111	34 (4), (5)	78
69	101	47	112	—	79
70	98	48	113	108	80
71	102	49	114	43, 44	83
72	—	50	115	45 to 48	112
73	—	51	116	—	84
74	—	50 (6)	117	—	—
75	104	52	118	125	87
76	105	53	119	—	88
77	54A	54	120	126	89
78	—	56	121	127	90
79	105A	57	122	128	92
			123	129	94
			124	—	—

# INDIAN COMPANY LAW

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
125	109 (1)	95	168	76 (2)	131 (5)
126	109 (2)	—	169	78	132
127	109A	97	170	79 (1)	—
128	110	95 (8)	171	79 (1) (a), Reg. 49 of Table A	133
129	111	95 (9)	172	79 (1) (b), Reg. 116 of Table A	134 (a)
130	112	98	173	Reg. 50 of Table A	—
131	113	—	174	79 (1) (c), Reg. 51 of Table A	134 (c)
132	114	98 (2)	175	Regs. 53, 54 of Table A	134 (d)
133	115	99	176	79 (1) (d), Regs. 64 to 67 of Table A	136
134	116	96	177	Reg. 56 of Table A	Reg. 58 of Table A
135	116 (3)	—	178	Reg. 56 of Table A	Reg. 58 of Table A
136	117	103	179	79 (1) (c) Reg. 59 of Table A	137
137	118	102	180	Reg. 59 of Table A	—
138	121	—	181	Reg. 63 of Table A	Reg. 65 of Table A
139	—	100	182	—	—
140	—	—	183	—	138
141	120	101	184	—	—
142	122	96 (3), 99 (2)	185	Reg. 57 of Table A	Reg. 59 of Table A
143	123	104	186	79 (3)	135
144	124	105	187	80	139
145	—	—	188	—	140
146	72	107	189	81	141
147	73, 74	108	190	—	142
148	75	—	191	—	144
149	103	109	192	82	143
150	31	110	193	83	145
151	31A	111	194	83 (2)	145 (2)
152	—	—	195	83 (3)	145 (3)
153	33	117	196	83 (5), (6), (7)	146
154	37	115	197	—	—
155	38	116 (1), (2), (3), 116 (4)			
156	39	119			
157	41	120			
158	42	124			
159	32 (1), (2)	125			
160	—	126, 127			
161	32 (3), (4)	124 (3) (4), 125 (3) (4), 126 (2), 127 (3)			
162	32 (5)	—			
163	36, 125	118			
164	40	130			
165	77	131			
166	76 (1)	131 (2), (3)			
167	—	—			

TABLE NO. 1

ci

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
198	—	—	243	—	169 (3)
199	—	—	244	—	169 (4), (5)
200	—	189	245	141 (3)	170
201	86C	205	246	143	171
202	—	187	247	—	172
203	—	188	248	—	173
204	—	—	249	—	—
205	Reg. 97 of Table A	Reg. 116 of Table A	250	—	174
206	—	—	251	—	175
207	—	—	252	83A	176
208	107	65	253	—	—
209	130	147	254	83B (1) (i)	Reg. 75 of Table A
210	131	148	255	87I	—
211	132	149	256	Regs. 78 to 82 of Table A	Regs. 89 to 92 of Table A
212	132A	150	—	—	Reg. 93 of Table A
213	—	153	257	—	Reg. 94 of Table A
214	—	—	—	—	—
215	133	155	258	Reg. 83 of Table A	Reg. 95 of Table A
216	131 (2)	156 (1)	259	86J (1) (b)	—
217	131A	157	260	Reg. 85 of Table A	Reg. 95 of Table A
218	—	156 (3)	261	—	—
219	135, 146	158	262	Reg. 84 of Table A	Reg. 95 of Table A
220	134	127	263	—	183
221	—	—	264	—	—
222	—	163	265	—	—
223	136	433	266	84	181
224	144 (3) to (6)	159	267	—	—
225	—	160	268	86J	—
226	144 (1) to (2A)	161	269	86J	—
227	145	162	270	85	182
228	—	—	271	—	—
229	—	—	272	85 (2)	182 (5)
230	131 (2)	162 (2)	273	—	—
231	145 (4)	162 (3)	274	86A	—
232	—	—	275	—	—
233	—	—	276	—	—
234	137	—	277	—	—
235	138	164 (1)	278	—	—
236	139	164 (2)	279	—	—
237	138, 142	165	280	—	185
238	—	—	281	—	182 (5)
239	—	166	282	—	186
240	140	167	—	—	—
241	141	168	—	—	—
242	141A	169 (1) (2)	—	—	—

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
283	86 I, Reg. 77 of Table A	Reg. 88 of Table A	318 319 320	— — —	191 192 193
284	86G	184	321	—	194
285	—	—	322	70	202
286	—	—	323	71	203
287	Reg. 88 of Table A	Reg. 99 of Table A	324 325 326	— — 87 CC	— — —
288	—	—	327	87 A (5), 87AA	— —
289	—	—		(Prov.)	—
290	86	180		87A	—
291	Reg. 71 of Table A	Reg. 80 of Table A	328 329	87AA, 87 CC	— —
292	—	—		—	—
293	86 H, Reg. 73 of Table A	—	330 331 332	— — —	— — —
294	—	—	333	87A (3)	—
295	86 D	—	334	87 B (b)	—
296	—	—	335	—	—
297	86 F	—	336	87 B (a)	—
298	—	—	337	—	—
299	91 A	199	338	—	—
300	91 B	—	339	—	—
301	—	—	340	—	—
302	91 C	—	341	87 B (a) (Prov.)	—
303	87 (1), (2)	200 (1) to (5)	342 343 344	— 87 B (c) —	— — —
304	87 (3), (4), (5)	200 (6), (7), (8)	345 346 347	— 87 BB —	— — —
305	—	—	348	87 C	—
306	—	—	349	87 C (3)	—
307	—	—	350	—	—
308	—	—	351	—	—
309	Reg. 69 of Table A	Reg. 76 of Table A	352 353 354	87 C (2) — —	— — —
310	86J (1) (a)	—	355 356 357	— — —	— — —
311	(ii) 86J (1) (a)	—	358 359 360	— — —	— — —
312	(iii) (c)	—	361	—	—
313	86B (1) 86B (Prov. & Expl.)	204 — —			
314	86E	—			
315	—	—			
316	—	—			
317	—	—			

TABLE NO. I

ciii

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
362	—	—	407	153 D	—
363	—	—	408	—	—
364	87 B (d)	—	409	86 J (2)	—
365	—	—	410	289 B	—
366	—	—	411	289 B	—
367	—	—	412	289 B	—
368	—	—	413	289 B	—
369	87 D	—	414	289 B	—
370	87 E	—	415	289 B	—
371	87 D (3), 87 E (2)	—	416	91 D	—
372	87 F	—	417	282 B (1)	—
373	—	—	418	282 B (2)	—
374	—	—	419	282 B (4)	—
375	87 H	—	420	482 B (5)	—
376	—	—	421	119 (1)	374
377	87 I	—	422	119 (2)	370 (1)
378	—	—	423	119 (3)	370 (2)
379	—	—	424	—	369
380	—	—	425	155	211
381	—	—	426	156	212
382	—	—	427	157	212 (2)
383	—	—	428	158	213
384	—	—	429	159	214
385	—	—	430	160	215
386	—	—	431	161	216
387	—	—	432	—	—
388	—	—	433	162	222
389	152	—	434	163	223
390	153 (6)	206 (6)	435	164	219
391	153 (1) to (5), (7)	206 (1) to (5)	436	165	219
392	—	—	437	—	—
393	—	207	438	—	—
394	153 A	208	439	166	224
395	153 B	209	440	218	224 (2)
396	—	—	441	168	229
397	153C (1)	210	442	169	226
398	153 C (1) (a)	—	443	170 (1), (2)	225
399	153C (3)	—	444	170 (3)	—
400	—	—	445	172	230
401	153C (2)	—	446	171	231
402	153C (5)	—	447	167	232
403	—	—	448	—	233
404	153C (6)	—	449	171 A	—
405	153C (9)	—	450	175 (2)	239
406	153C (10)	—	451	175 (5)	242 (5)
			452	177	239 (f)
			453	175 (6)	—



Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
454	177 A	235	498	—	291
455	177 B	236	499	209	292
456	178	243	500	209 A	293
457	179	245	501	—	—
458	180	245 (4)	502	209 B	294
459	181	—	503	209 C	295
460	183	246	504	209 D (1)	296 (1)
461	182 (1), (2), (3)	247	505	209 D (2)	296 (2)
462	182 (4), (5)	249	506	209 E	297
463	—	—	507	209 F	298
464	178 A (1), (2), (3)	252	508	209 G	299
465	178 A (4) to (12)	253	509	209 H	300
466	173	256	510	210	301
467	184	257	511	211	302
468	185	258	512	212	303
469	186	259	513	—	335
470	187	260	514	—	336
471	188	261 (1)	515	213	304
472	189	261 (2)	516	214	305
473	190	262	517	215	306
474	191	264	518	216	307
475	192	265	519	—	—
476	193	267	520	217	309
477	195	268	521	218	310
478	196	270	522	221	311
479	197	271	523	222	312
480	198	272	524	224	314
481	194	274	525	—	—
482	200	276 (1), (2)	526	225	315
483	202	277	527	226	241 (c)
484	203	278	528	228	316
485	206	279	529	229	317
486	204	280	530	230	319
487	205	281	531	231	320
488	207	283	532	231 (3)	320 (2)
489	208	284	533	—	321
490	208 A (1)	285 (1)	534	233	322
491	208 A (2)	285 (2)	535	230 A	323
492	208 B	286	536	227	227, 282
493	—	—	537	232	228, 313
494	208 C	287	538	238 A	328
495	—	288	539	236	329
496	208 D	289	540	—	330
497	208 E	290	541	—	331
			542	—	332
			543	235	333
			544	—	—
			545	237	334

TABLE NO. 1

CV

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
546	234	303	593	277 (1)	409
547	—	—	594	277 (3)	410
548	240	340	595	277 (4)	411
549	241	266	596	277 (2)	412
550	242	341	597	—	413
551	244	342	598	277 (6)	414
552	244A	248	599	—	—
553	244A	248	600	277D	106
554	244A	248	601	277 (8)	—
555	244B	343	602	277 (7)	415
556	—	—	603	277B	417
557	174, 223.	346	604	—	419
	239		605	277A	420
558	245	351	606	277A (5)	421
559	243	352	607	—	422
560	247	353	608	—	423
561	250	377	609	248	424
562	251	378	610	248 (5)	426
563	—	379	611	249 (1)	425 (1)
564	252	380	612	249 (2)	425 (2)
565	253	382	613	—	—
566	254	383	614	249A	428
567	255	384	615	—	—
568	256	385	616	287	—
569	257	386	617	—	—
570	258	387	618	—	—
571	259	430	619	—	—
572	—	388	620	—	—
573	261	389	621	—	—
574	262	390	622	278 (1)	—
575	263	391	623	278 (2)	—
576	264	392	624	278 (3)	—
577	265	393	625	—	—
578	266	394	626	279	444
579	267	395	627	—	441
580	268	396	628	282	438
581	269	397	629	238	—
582	270	398	630	282A	—
583	271 (1)	399	631	283	489
584	271 (3)	400	632	280	447
585	272	401	633	281	448
586	273	402	634	199	449
587	274	403	635	—	—
588	275	—	636	—	—
589	276	404	637	—	—
590	—	405	638	—	451
591	—	406	639	—	—
592	277 (1)	407	640	—	—

Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948	Sections of Act of 1956	Sections of Act of 1913	Sections of English Act of 1948
641	151 (2), (3)	454	650	288	—
642	151 (4), (5)	454 (2)	651	—	—
643	246	365	652	—	459 (11)
644	290	459	653	286	—
645	—	459 (2)	654	—	459 (12)
646	—	459 (6)	655	—	459 (13)
647	284	—	656	290 (1)	459 (14) (a)
648	—	459 (8)	657	290 (1)	459 (14) (b)
649	—	459 (10)	658	(b) (c)	(c) (d) (e)
				290 (3)	459 (16)

TABLE NO. II

## CORRESPONDING REGULATIONS OF TABLE A OF COMPANIES ACTS

Regs. of Act of 1956	Regs. of Act of 1913	Regs. of English Act of 1948	Regs. of Act of 1956	Regs. of Act of 1913	Regs. of English Act of 1948
1	1	1	26	22	30
2	3	3	27	—	31
3	4	4	28	23	32
4	—	5	29	24	33
5	—	6	30	25	34
6	—	7	31	26	35
7	6	8	32	27	36
8	7	9	33	28	37
9	9	11	34	29	38
10	10	12	35	30	39
11	—	13	36	31	40
12	11	14	37	32	41
13	12	15	38	33	42
14	—	16	39	34	43
15	13	17	40	35	—
16	14	18	41	38	—
17	—	19	42	39	—
18	17	21	43	40	—
19	18	22	44	41	44
20	19	23	45	44	45
21	20	24	46	44 A	46
22	20	25	47	47	48
23	—	27	48	48	49
24	—	28	49	51, 52	53
25	21	29	50	53	55

TABLE NO. III

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Regs. of Act of 1956	Regs. of Act of 1913	Regs. of English Act of 1948	Regs. of Act of 1956	Regs. of Act of 1913	Regs. of English Act of 1948
51	54	55	76	90	101
52	—	56	77	91	102
53	55	57	78	92	103
54	58	60	79	93	104
55	59	61	80	94	105
56	60	62	81	—	106
57	61	63	82	—	110
58	62	64	83	—	112
59	63	65	84	76	113
60	—	66	85	95	114
61	66	69	86	96	115
62	67	70	87	99	117
63	—	73	88	98	118
64	68	75	89	—	119
65	69	76	90	—	120
66	70	77	91	—	121
67	71	80	92	100	—
68	—	82	93	101	—
69	—	83	94	102	122
70	—	85	95	105	125
71	75	86	96	—	128
72	85	95	97	—	129
73	87	98	98	—	135
74	87	98	99	—	136
75	89	100			

TABLE NO. III

CORRESPONDING SECTIONS OF COMPANIES ACTS.

Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948	Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948
1	1	462	6	13	2
2 (1)	2	455 (1)	7	13	2
2 (2)	2 (19),	154	8	13	2
	2 (47),	455 (1)	9	15	3
	4		10	16	4
2 A	3 (2)	—	11	20 to 23	17, 18
3	10	218, 220	12	17	5(1) to (6)
4	11	429,	13	17	5(1) to (6)
		434 (1)	14	17	5(1) to (6)
5	12	1	15	18	5 (7)

Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948	Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948
16	19	5 (8)	57	102	68
17	26, 27	6, 7	58	101	67
18	28	8	59	101	67
19	30	9	60	102	68
20	31	10	61	103	69
20 A	38	22	62	103	69
21	36	20	63	104	70
22	33	12	64	105	71
23	34	13	65	102	68
24	33, 35	15	66	94	61
25	39	24	66 A	106, 107	72
25 A	40	—	67	32	16
26	25	19	68	98	64
27	37	21	69	99	60
28	82, 83	73, 74	70	322	202
29	84	81	71	323	203
30	41	26	72	146	107
31	150	110	73	147	108
31 A	151	111	74	147	108
32	159, 161,	124 to	75	148	—
	162	127	76	166, 168	131
33	153	117	77	165	130
34	108, 110,	75, 78	78	169	132
	111		79	170 to	133 to 137
35	109	76		172, 174,	
36	163	—		176, 179,	
37	154	115		186	
38	155	116 (1) to	80	187	139
		(8)	81	189	141
39	156	116 (4)	82	192	143
40	164	118	83	193 to 196	145, 146
41	157	119	83 A	252	176
42	158	120	83-B	254	Reg. 75 of Table A
43	114	83		266	181
44	114	83	84	270, 272	182
45	115	112	85	290	180
46	115	112	86	174	—
47	115	112	86 A	312, 313	204
48	115	112	86 B	201	205
49	92, 93	59 (b), 59 (c)	86 C	295	—
		61	86 D	314	—
50	94	62	86 E	297	—
51	95	—	86 F	284	184
52	96	—	86 G	293	—
53	97	63	86 H	283	Reg. 88 of Table A
54 A	77	54	86 I		
55	100	66			
56	101	67			

TABLE NO. III

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Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948	Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948
86 J	259, 268, 269, 310, 311, 409	—	108 109 109 A	113 125, 126 127	80 95 97
87	303, 304	200	110	128	95 (8)
87 A	327, 328, 353	—	111 112	129 130	95 (9) 98
87 AA	327, 329	—	113	131	—
87 B	341, 443, 364	—	114 115	132 133	98 (2) 99
87 BB	346	—	116	134, 135	96
87 C	348, 349	—	117	136	103
87 CC	326, 329	—	118	137	102
87 D	369, 371	—	119	421 to 423	370, 374
87 E	370, 371	—	120	141	101
87 F	372	—	121	138	—
87 G	—	—	122	142	96 (3), 99 (2)
87 H	375	—	—	—	—
87 I	255, 377	—	123	143	104
88	46	32	124	144	105
89	47	33	125	118	87
90	48	34	126	120	89
91	50	35	127	121	90
91 A	299, 301	199	128	122	92
91 B	300	—	129	123	94
91 C	302	—	130	209	147
91 D	416	—	131	210, 216, 230	148, 156 (1), 162 (2)
92	55, 59, 60	37, 40 (2), (3), 41	—	—	—
93	56, 66, Sch. II	38, Sch. IV.	131 A 132 132 A	217 211 212	157 149 150
94	—	—	133	215	155
95	—	—	134	220	127
96	—	—	135	219	158
97	63	44	136	223	433
98	70	48	137	234	—
98 A	64	45	138	235	164 (1)
99	61	42	139	236	164 (2)
100	62	43	140	240	167
101	69	47	141	241, 245	168, 170
102	71	49	141 A	242	169 (1), (2)
103	149	109	142	237	165
104	75	52	143	246	171
105	76	53	144	224, 226	159, 161
105 A	79	57	145	227	162
105 B	80	58	146	219	158
105 C	81	—	147	45	31
106	—	—	148	51	437
107	208	65	—	—	—

Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948	Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948
149	52	—	185	468	258
150	54	36	186	469	259
151	14, 29, 641, 642	11, 454	187	470	260
152	389	—	188	471	261 (1)
153	390, 391	206	189	472	261 (2)
153 A	394	208	190	473	262
153 B	395	209	191	474	264
153 C	397 to 399 401, 402, 404 to 406	—	192	475	265
153 D	407	—	193	476	267
154	43, 44	29, 30	194	481	274
155	425	211	195	477	268
156	426	212	196	478	270
157	427	212 (2)	197	479	271
158	428	213	198	480	272
159	429	214	199	634	449
160	430	215	200	482	276 (1) (2)
161	431	216	201	—	276 (3)
162	433	222	202	483	277
163	434	223	203	484	278
164	435	219	204	486	280
165	436	219	205	487	281
166	439	224	206	485	279
167	447	232	207	488	283
168	441	229	208	489	284
169	442	226	208A	490, 491	285
170	443, 444	225	208B	492	286
171	446	231	208C	494	287
171 A	449	—	208D	496	289
172	445	230	208E	497	290
173	466	235	209	499	292
174	557	246	209A	500	293
175	450, 451, 453	238, 242 (5)	209B	502	294
176	—	—	209C	503	295
177	452	239 (f)	209D	504, 505	296
177 A	454	235	209E	506	297
177 B	455	236	209F	507	298
178	456	243	209G	508	299
178 A	464, 465	252, 253	209H	509	300
179	457	245	210	510	301
180	458	245 (4)	211	511	302
181	459	—	212	512	303
182	461, 462	247, 249	213	515	304
183	460	246	214	516	305
184	467	257	215	517	306
			216	518	307
			217	520	309
			218	440, 521	224 (2), 310

TABLE NO. III

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Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948	Sections of Act of 1913	Sections of Act of 1956	Sections of English Act of 1948
220	—	—	259	571	430
221	522	311	260	—	—
222	523	312	261	573	389
223	557	346	262	574	390
224	524	314	263	575	391
225	526	315	264	576	392
226	527	241 (c)	265	577	393
227	536	227, 282	266	578	394
228	528	316	267	579	395
229	529	317	268	580	396
230	530	319	269	581	397
230A	535	323	270	582	398
231	531, 532	320	271	583, 584	399, 400
232	537	228, 313	272	585	401
233	534	322	273	586	402
234	546	303	274	587	403
235	543	333	275	588	—
236	539	329	276	589	404
237	545	334	277	592 to 596,	407,
238	629	—		598, 601	409 to 412,
238A	538	328		602	414, 415
239	557	346	277A	605, 606	420, 421
240	548	340	277B	603	417
241	549	266	277C	—	—
242	550	341	277D	600	106
243	559	352	277E	—	—
244	551	342	278	622 to 624	—
244A	552 to 554	248	279	626	444
244B	555	343	280	632	447
245	558	351	281	633	448
246	643	365	282	628	438
247	560	353	282A	630	—
248	609, 610	424, 426	282B	417 to 320	—
249	611, 612	425	283	631	439
249A	614	428	284	647	—
250	561	377	285	—	—
251	562	378	286	653	—
252	564	380	287	616	—
253	565	382	288	650	—
254	566	383	289	—	—
255	567	384	289A	—	—
256	568	385	289B	410 to 415	—
257	569	386	290	644,	459
258	570	387		656 to 658	—



## TABLE No. IV

## CORRESPONDING REGULATIONS OF TABLE A OF COMPANIES ACTS

Regs. of Act of 1913	Regs. of Act of 1956	Regs. of English Act of 1948	Regs. of Act of 1913	Regs. of Act of 1956	Regs. of English Act of 1948
1	1	1	44 A	46	46
2	—	—	45	—	—
3	S. 80	2	46	—	—
4	3	4	47	47	48
5	—	—	48	48	49
6	7	8	49	S. 171	50
7	8	9	50	S. 173	52
8	—	—	51	49, S. 174	53
9	9	11	52	49 (3), (4)	54
10	10	12	53	50	55
11	12	14	54	51	55
12	13	15	55	53	57
13	15	17	56	SS. 177,	58
14	16	18	—	178	—
15	—	—	57	S. 185	59
16	—	—	58	54	60
17	18	21	59	55	61
18	19	22	60	56	62
19	20	23	61	57	63
20	21, 22	24, 25	62	58	64
21	25	29	63	59, S. 181	65
22	26	30	64	S. 176	67
23	28	32	65	S. 176	68
24	29	33	66	61, S. 176	69
25	30	34	67	62, S. 176	70
26	31	35	68	64	75
27	32	36	69	65	76
28	33	37	70	66	77
29	34	38	71	67, S. 291	80
30	35	39	72	S. 2 (26)	—
31	36	40	73	S. 293 (1)	79
32	37	41	—	(d)	—
33	38	42	74	—	—
34	39	43	75	71	86
35	40	—	76	84	113
36	—	—	77	S. 283	88
37	—	—	78 to 82	S. 256	89 to 92
38	41	—	83	S. 258	94
39	42	—	84	S. 262	95
40	43	—	85	72, S. 260	95
41	44	44	86	S. 284 (1)	96
42	S. 81	—	87	73, 74	98
43	—	—	88	S. 287	99
44	45	45	89	75	100

TABLE NO. IV

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Regs. of Act of 1913	Regs. of Act of 1956	Regs. of English Act of 1948	Regs. of Act of 1913	Regs. of Act of 1956	Regs. of English Act of 1948
90	76	101	102	94	122
91	77	102	103	S. 209 (1)	123
92	78	103	104	S. 209 (1)	124
93	79	104	105	95	125
94	80	105	106	S. 210	126
95	85	114	107	S. 211	S. 149
96	86	115	108	S. 217	S. 157
97	S. 205	116	109	S. 219	127
98	88	118	110	—	—
99	87	117	111	—	—
100	92	—	112 to 115	S. 53	131 to 134
101	93	—	116	S. 172	S. 134

## TABLE No. V

## WHAT THE EXISTING COMPANIES ARE TO DO.

Sections	Requirements thereof
24	A private limited company is to send its certificate of registration and memorandum of association to the Registrar for getting the word "Private" entered before the word "Limited" in the name of the company upon the register.
24/147	As the words "Private Limited" become a part of the name of such a company, the name together with these words should be painted or affixed on the outside of every office or place of business. The company should also have such name engraven on its seal and mentioned in all its business letters etc. as provided in sub-s. (1) of s. 147.
42 (3)	A subsidiary company which is already a member of its holding company, otherwise than as legal representative of a deceased member or as a trustee, must not vote at meetings of the holding company or of any class of members thereof.
49 (1) (b)	Where any investment made by a company is not held at the commencement of the new Act in its own name, it must, within one year from such commencement, either cause them to be transferred to, and hold them in, its own name, or dispose of them.
49 (7)	The company must forthwith enter in a register maintained by it the particulars specified in cls. (a) and (b) of sub-s. (7) of s. 49.
78 (3)	Where shares have been issued at a premium, the company must comply with the provisions of s. 78 except where any part of the premiums does not at the commencement of the new Act form an identifiable part of the companies reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the share premium account.
89	In the case of a public company or its subsidiary private company limited by shares, all existing shares having disproportionately excessive voting rights, the company should within one year from the commencement of the new Act reduce such voting rights and bring them into conformity with the voting rights attached to its equity shares under sub-s. (1) of s. 87. See s. 90.  Before the voting rights are brought into such conformity, the holders of the shares having excessive voting rights shall not exercise in respect thereof such voting rights regarding the resolutions specified in cls. (a) to (c) of sub-s. (2) of s. 89.  For other provisions in this respect see sub-ss. (3) and (4) of s. 89.

## Sections

## Requirements thereof

- 106 (2) Where in the memorandum or articles of a company a proportion less than three-fourths has been specified, it shall have effect as if the proportion of three-fourths had been specified therein instead for the purposes of sub-s. (1) of s. 106.
- 145 Any mortgage or charge created before the commencement of the new Act which did not require registration under the Companies Act, 1913, but is so required under the present Act must be registered *within 21 days of the commencement of the new Act, that is, 1st April, 1956.*
- The following will fall within the above category, namely, a mortgage or charge on stock-in-trade, otherwies than by way of a floating charge ; a mortgage or charge on calls made but not paid ; a mortgage or charge on a ship or any share in a ship ; (a) a mortgage or charge on goodwill, on a patent or a license under a patent, on a trade mark, or on a copyright or a licence under a copyright.
- 199 Where any commission or other remuneration payable to an officer or employee of a company is fixed at a percentage of or is otherwise based on, the net profits such profits shall after one year from the commencement of the new Act be calculated in the manner set out in ss. 349 to 351.
- 202 (2) Where any officer or employee of the company is entitled to any tax-free remuneration, he shall not be so entitled after the expiry of the residue of the term of his office.
- 202 An undischarged insolvent must not act as a director, managing agent, secretaries and treasurers or manager, or directly or indirectly take part in the management of the company.
- 204 (3) In the case of a public company or its subsidiary private company any firms or body corporate holding any office or place of profit under the company, other than the office of managing agent or secretaries and treasurers shall, unless its office expires earlier, be deemed to have vacated its office immediately on the expiry of five years from the commencement of the new Act. See sub-s. (6) of s. 204.
- 252 Every private company which is not subsidiary of a public company must have at least two directors.
- 261' (4) S. 261 lays down that certain persons specified in sub-s. (1) thereof shall not be appointed directors, except by special resolution. A director holding any office immediately before the commencement of the new Act must not continue to hold that office after the next general meeting of the company.
- 267 The company shall not, after the commencement of the new Act employ or continue the appointment or employment

Sections	Requirements thereof
	of persons specified in s. 267 as its managing or whole-time director.
271	Every director of a public company or its subsidiary private company must within two months after the commencement of the new Act file with the company a declaration specifying the qualification shares held by him. See s. 273.
276	Any person holding office as director in more than twenty companies must within two months from the commencement of the new Act choose not more than twenty such companies, resign his office in others and intimate his choice to each of the companies in which he was holding the office of director, to the Registrar having jurisdiction in respect of each of such companies, and also to the Central Government.
280	A director of a public company or its subsidiary private company must vacate his office at the conclusion of the third annual general meeting of the company after the commencement of the new Act, if he has attained the age of 65 before the commencement of that meeting.
294	Where before the commencement of the new Act the company has appointed a sole selling agent for any area for a period not less than 5 years, the appointment must be placed before a general meeting within 6 months from such commencement and the said meeting may by resolution take actions mentioned in cls. (a) and (b) of sub-s. (3) of s. 294.
295 (3)	Where any loan made guarantee given or security provided by a lending company and outstanding at the commencement of the new Act requires approval of the Central Government under the present Act, the company must within 6 months from such commencement, obtain the approval of the Central Government or enforce repayment of the loan.
309 (8)	The provisions for the remuneration of a director of a public company or its subsidiary private company must be as provided in s. 309, on the commencement of the new Act. But where such commencement does not coincide with the end of the company's financial year, such remuneration will come into force with effect from the expiry of the financial year immediately succeeding such commencement. See sub-s. (a) of s. 309.
314	Directors, their relatives etc., of a company, private or otherwise, who hold any office or place of profit in the company should obtain the company's consent by a special resolution for holding such office. For detailed provision s. 314 should be carefully read.
316 (3)	Any person holding the office of managing director or manager in more than two companies at the commencement of

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the new Act, must choose not more than two of these companies within one year from such commencement; and the provisions of cls. (b) and (c) of sub-s. (1) and of sub-ss. (2) and (3) of s. 276 shall apply *mutatis mutandis* to the case. S. 316 does not apply to a private company unless it is subsidiary of a public company. See s. 315.

- 317 (2) and A person holding at the commencement of the new Act the office of managing agent or manager shall, unless his term expires earlier, be deemed to have vacated his office on the expiry of 5 years from such commencement. S. 317 also does not apply to a private company unless it is subsidiary of a public company. See s. 315.
- 325 (4) Where at the commencement of the new Act a company having a managing agent is itself acting as a managing agent of any other company, the term of office of the first mentioned company as managing agent of the other company shall, if it does not expire earlier, expire on 15th August, 1956.
- 330 The company having a managing agent at the commencement of the new Act should re-appoint him after 15th August, 1958 for a fresh term in accordance with the provisions of the present Act, as his term of office will under s. 330 expire on 15th August, 1960.
- 332 After 15th August, 1960 no person shall, at the same time, hold office as managing agent in more than 10 companies. For details see s. 332.
- 345 Where the office of managing agent of a public company or its subsidiary private company is held by an individual at the commencement of the new Act, succession to the office by inheritance or devise in accordance with the managing agency agreement will not be allowed, unless approved by the Central Government. So the company should secure such approval. See sub-s. (2) of s. 345.
- 347 and Every firm or company acting as managing agent or secretaries and treasurers should file with the managed companies within one month after the commencement of the new Act particulars specified in Schedule VIII of the present Act.
- 379
- 348 A public company or its subsidiary private company shall not pay to its managing agent in respect of any financial year beginning at or after the commencement of the new Act any remuneration in excess of the net profits of that financial year as determined by s. 349. See s. 355.
- 353 After the commencement of the new Act the remuneration payable to the managing agent of a public company or its subsidiary private company for any financial year or part thereof must not be paid to him until the accounts of the

## Sections

## Requirements thereof

company for such financial year have been audited and laid before the company in general meeting. But the minimum remuneration payable under s. 198 may be paid in suitable instalments as may be specified in the articles or resolution passed at an annual general meeting or the managing agency agreement. See s. 355.

- 354 | After the commencement of the new Act the managing agent of a public company or its subsidiary private company must not draw any office allowance, but may be re-imbursed in respect of expenses incurred by him on behalf of the company and sanctioned by the Board of directors or by the company in general meeting. See s. 555.
- 361 | All existing contracts with the managing agent or his associates for selling agencies, buying agencies etc. referred to in ss. 356 to 360 shall terminate at the latest on 1st March, 1958.
- 369 (2) | Current accounts held by a managing agent in his own name must not exceed Rs. 20,000 in the aggregate.
- 373 | Where investments have been made by a company before 1st April, 1952 which require under s. 372 the authority of a resolution of the investing company and approval of the Central Government, such authority and approval must be obtained to such investments within 6 months from the commencement of the new Act. If such authority and approval are not so obtained the Board of directors must dispose of those investments in excess of the limits specified in s. 372 within 2 years from the commencement of the new Act.
- 375 | If the managing agent continues to engage in similar competitive business on his own account, he must obtain the sanction of a special resolution.
- 377 (4) | Where at the commencement of the new Act the number of directors appointed by the managing agent exceeds the number authorised under s. 377 (1), the managing agent should choose which of them shall continue in office and intimate his choice to the company within one month of the aforesaid commencement.
- 384 | A firm or body corporate employed as the manager of a public company or its subsidiary private company must vacate the office within 6 months after the commencement of the new Act.
- 385 | Undischarged insolvents and other persons mentioned in cls. (a), (b) and (c) of sub-s. (1) of s. 385 must not act as manager of a company.

Sections	Requirements thereof
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| 386 (3) | Where at the commencement of the new Act any person is holding the office of manager or managing director in more than two companies, he must, within one year of such commencement choose not more than two of those companies and intimate his choice to the Registrar and the Central Government. |
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**TABLE No. VI**  
**DIRECTOR'S OBLIGATIONS AND LIABILITIES**

Sections	Requirements thereof
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| 62                          | Civil liability for mis-statements in prospectus.  |
| 63                          | Criminal liability for mis-statements in prospectus.   |
| 71 (3)                      | To compensate the company and the allottee for any loss, damages or costs in consequence of contravention of any of the provisions of s. 69 or s. 70 with respect to allotment.  |
| 73 (2)<br>and<br>6 (b) (ii) | To repay all moneys received from applicants for shares or debentures in pursuance of the prospectus, with interest at 5 p.c. p. a., if the company fails to repay them within 8 days as provided in sub-s. (2) of s. 73.                          |
| 161                         | To sign the copy of the annual return to be filed with the Registrar under s. 159 or s. 160 as well as the certificate (in the case of a private company) specified in sub-s. (2) of s. 161.   |
| 165                         | To perform the duties imposed by s. 165 in connection with the statutory meeting and statutory report of the company.  |
| 169                         | To perform the duties imposed by s. 169 in connection with the extraordinary general meeting on requisition, and to repay any reasonable expenses incurred by the requisitionists for failure by the Board of directors duly to call that meeting. |
| 209 (5)                     | To take all reasonable steps to secure compliance with the requirements of s. 209 regarding books of account to be kept by the company.  |
| 210                         | To take all reasonable steps to comply with the provisions of s. 210 as to the laying before the company the annual account, balance-sheet etc.  |



Sections

Requirements thereof

- 215 To approve the balance-sheet and profit and loss account before they are submitted to the auditors for their report thereon, and to authenticate them as provided in s. 215.
- 217 To take all reasonable steps to comply with the provisions of s. 217 regarding the report of the Board of directors.
- 264/266 To sign and file with the Registrar a consent in writing to act as a director and to comply with cl. (b) of sub-s. (1) of s. 266 relating to his qualification shares.
- 270 To obtain his qualification shares within two months after his appointment as director.
- 271 To file with the company within 2 months after appointment as director or within 2 months after the commencement of the new Act, a declaration specifying the qualification shares held by him. This provision does not apply to a private company unless it is a subsidiary of a public company and also to a technical director or a director appointed by the Central or a State Government.
- 275 Not to hold office as director, save as otherwise provided in s. 276, in more than 20 companies.
- 276 Within 2 months from the commencement of the new Act, (a) to choose not more than 20 companies where he wishes to continue to hold the office of director; (b) to resign his office as director in the other companies; (c) to intimate his choice to the Registrar having jurisdiction in respect of each of such company and also to the Central Government; (d) not to act as director in more than 20 companies after the expiry of 2 months from the aforesaid commencement; and (e) not to act as director in any company after despatching resignation.
- 277 To make his choice under sub-s. (2) of s. 277 regarding directorships he wishes to continue to hold or to accept.
- 280 (2) To vacate his office as director of a public company or its subsidiary private company at the conclusion of the annual general meeting commencing next after he attains the age of 65 years. As regards a director of such a company who is in office at the commencement of the new Act, see the Proviso to sub-s. (2) of s. 280.
- 282 To give notice of his age to the company where he is appointed or to his knowledge is proposed to be appointed director at a time when he has attained the age of 65 years or such lower age, if any, as may be specified in the articles.
- 293 In the case of a public company or its subsidiary private company, not to do the acts specified in cls. (a) to (e) of sub-s. (1) of s. 293 without the consent of such company in general meeting.

Sections	Requirements thereof
294	Not to appoint a sole selling agent for any area, if the appointment is not approved by the company in general meeting within 6 months.
295	Not to receive any loan from the company of which he is a director, in contravention of s. 295.
297	To obtain sanction of the Board of directors for entering into a contract with the company, (a) for the sale, purchase or supply of any goods, materials or services, or (b) for underwriting the subscription of any shares in, or debentures of the company.
299	To disclose the nature of his concern or interest in a contract or proposed contract with the company, at a meeting of the Board of directors. For details, see s. 299.
300	Not to participate, or vote in, the Board's proceedings in respect of contracts or arrangements mentioned in s. 299. For exceptions see sub-ss. (2) and (3) of s. 300.
305	To disclose to the company, within 20 days of his appointment, the particulars relating to the office in other body corporate which are required to be specified under sub-s. (1) of s. 303.
308	To give notice to the company of his shareholdings in other bodies corporate and such other matters relating to himself, as may be necessary for the purpose of enabling the company to comply with the provisions of s. 307.
309	Not to receive remuneration in contravention of s. 309 read with s. 198. This provision does not apply to a private company unless it is a subsidiary of a public company.
310	To obtain approval of the Central Government for any provision for increase of his remuneration. This provision also does not apply to a private company unless it is a subsidiary of a public company.
312	Not to assign his office of director.
314	Except with the previous consent of the company by a special resolution, not to hold any office or place of profit, (a) under the company, and (b) under any subsidiary of the company, except that of managing director, managing agent, secretaries and treasurers, manager, legal or technical adviser, banker or trustee for the debenture holders of the company.
318	Not to receive payment by way of compensation for loss of office or as consideration for retirement from office.
319	Not to receive, in connection with the transfer of the whole or any part of the undertaking or property of the com-

Sections

Requirements thereof

pany, any compensation for loss of, or retirement from, office, (a) from such company; or (b) from the transferee of such undertaking or property or from any other person unless particulars of the payment proposed to be made by such transferee or person have been disclosed to, and the proposal has been approved by, the company in general meeting.

320 (1) Not to receive any compensation for loss of office or retirement from, office, in connection with the transfer to any persons of all or any of the shares in a company, being a transfer resulting from any of the offers specified in cls. (i) to (iv) of sub-s. (1) of s. 320, (a) from such company or (b) from the transferees of the shares or from any other person.

320 (2) In the case referred to in cl. (b) of sub-s. (1) of s. 320, to take all reasonable steps to secure that particulars with respect to the payment proposed to be made by the transferees or other person are included in or sent with, any notice of the offer made for their shares which is given to any shareholders. See in this connection s. 321 also.

478/519 To be publicly examined under s. 478 or s. 519.

488 In a proposed members' voluntary winding up, to make a declaration of solvency in accordance with the provisions of s. 488.

519 To be publicly examined under s. 519.

542 To be personally responsible for debts and other liabilities of the company where business of the company has been carried on with intent to defraud creditors or other persons or for any fraudulent purpose.

543 To repay or restore the money or property of the company with interest or to contribute sums to the assets of the company by way of compensation in respect any misapplication, retainer, misfeasance or breach of trust mentioned in s. 543.

*N.B.—For other liabilities, see Table No. XXIV under the heading "Offences, Offenders and Maximum Punishment".*

*As to the personal liability of a director, see also Table No. XII under the heading "Where Personal Liability".*

**PERSON IN ACCORDANCE WITH WHOSE DIRECTIONS OR INSTRUCTIONS DIRECTORS ARE ACCUSTOMED TO ACT.**

For definition, see s. 7.

For other provisions, see ss. 162, 203, 295, 305, 307 and 369.

**TABLE NO. VII**  
**MANAGING DIRECTOR'S OR WHOLE TIME DIRECTOR'S**  
**OBLIGATIONS AND LIABILITIES**

Sections	Requirements thereof
267	Not to be appointed as managing or whole time director, if he is one of the persons specified in cls (a) to (c) of s. 267.
268	To obtain the Central Government's approval for an amendment of any provision relating to his appointment or re-appointment. This provision does not apply to a private company unless it is a subsidiary of a public company.
269	To obtain the Central Government's approval for his appointment for the first time after the commencement of the Act in the case of an existing company, and after the expiry of 3 months from the date of its incorporation in the case of any other company. This provision also does not apply to a private company, unless it is a subsidiary of a public company.
305	To disclose to the company, within twenty days of his appointment the particulars relating to the office in the other body corporate which are required to be specified under sub-s. (1) of s. 303.
309	Not to receive remuneration in contravention of s. 309 read with s. 198. This provision does not apply to a private company unless it is a subsidiary of a public company.
310	To obtain approval of the Central Government for any provision for increase of his remuneration. This provision also does not apply to a private company, unless it is a subsidiary of a public company.
316	Not to be appointed or employed as managing director of any other company, except as provided in sub-s. (2) of s. 316.  To choose by a managing director holding office of more than two companies at the commencement of the new Act, within one year from such commencement not more than two of those companies in which he wishes to continue to hold the office of managing director. In a proper case the Central Government may however permit a person to be appointed as a managing director of more than two companies.  These provisions do not apply to a private company, unless it is a subsidiary to a public company.
317	Not to be appointed or employed as a managing director for a term exceeding 5 years at a time. A managing director holding office at the commencement of the new Act is to vacate his office on the expiry of 5 years from such commencement, unless his term expires earlier.

## Sections

## Requirements thereof

These provisions also do not apply to a private company, unless it is a subsidiary of a public company.

- 318 Not to receive any compensation for loss of, or a consideration for retirement from, office in the cases specified in cls. (a) to (f) of sub-s. (3) of s. 318, or in contravention of sub-s. (4) of s. 318.
- 416 At the time of entering into a contract for the company in which contract the company is an undisclosed principal, to make a memorandum in writing of the terms of the contract and to specify therein the person with whom it is entered into; and to deliver such memorandum to the company and send copies thereof to each of the directors.
- These provisions do not apply to a private company unless it is a subsidiary of a public company.
- 478/519 To be publicly examined under s. 478 and s. 519.
- 538 To comply with the provisions of s. 538 in any mode of winding up of the company.
- 542 To be personally responsible for debts and other liabilities of the company where its business has been carried on with intent to defraud creditors or other persons or for any fraudulent purpose.
- 543 To repay or restore the money or property of the company with interest or to contribute sums to the assets of the company by way of compensation in respect of any misapplication, retainer, misfeasance or breach of contract mentioned in s. 543.

*N.B.—A managing director or a whole time director being a director of the company, for his obligations and liabilities see Table No. VI under the heading “Director’s Obligations and Liabilities”.*

*As to the personal liability of a managing director or a whole time director, see Table No. XII under the heading “Where Personal Liability”.*

*For other liabilities, see Table No. XXIV under the heading “Offences, Offenders and Maximum Punishment”.*

## TABLE NO. VIII

### MANAGING AGENT'S OBLIGATIONS AND LIABILITIES

Sections	Requirements thereof
161	To sign the copy of the annual return to be filed with the Registrar under s. 159 or s. 160 as well as, in the case of a private company, the certificate specified in sub-s. (2) of s. 161.
198	To comply with, in the case of a public company or its subsidiary private company, the provisions of s. 198 relating to the overall maximum managerial remuneration, and minimum remuneration in the absence or inadequacy of profit.
200	To comply with the provisions of s. 200 regarding prohibition of tax-free payments to officers or employees of the company.
201	To comply with the s. 201 relating to the avoidance of provisions relieving liability of officers and auditors of the company or indemnifying them against any liability, which by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, misfeasance etc. mentioned in that section.
209 (5)	To take all reasonable steps to secure compliance with the requirements of s. 209 regarding books of account to be kept by the company.
210 (6)	To see that the provisions of s. 210 relating to the annual accounts and balance sheet are complied with.
211 (7)	To take all reasonable steps to secure compliance with the provisions of s. 211 as respects any accounts laid before the company in general meeting and with other requirements of the new Act to the matters to be stated in the accounts.
212 (9)	To take all reasonable steps to comply with the provisions of s. 212 regarding balance sheet of holding company.
217 (6)	To see that the provisions of sub-ss. (1) to (3) of s. 217 are complied with.
221	To furnish without delay to the company and its auditor the particulars or information to be given in the balance sheet or profit and loss account or in any document required to be annexed or attached thereto.
242	To give the Central Government all assistance in connection with the prosecution by the Central Government referred to in sub-s. (1) of 242.
243	To be wound up and to an order under s. 397 or s. 398, as provided in s. 243.

Sections	Requirements thereof
244	To be proceeded against for recovery of damages or property as provided in s. 244.
245	To re-imburse the Central Government in respect of expenses of investigation mentioned in s. 245.
247	To investigation of the ownership etc. of the managing agency as provided in s. 247.
248	To give information to the Central Government regarding persons having an interest in the company, body corporate or firm acting as managing agent of a company, as provided in s. 248.
249	To give information to the Central Government in investigation of associateship with the managing agent, etc. as provided in s. 249.
261	Not to appoint as directors the persons specified in cls. (a) to (g) of sub-s. (1) of s. 261 except by a special resolution of the company with special notice thereof.
292	Not to exercise the powers mentioned in sub-s. (1) of s. 292 except in accordance with delegation made by the Board of directors according to the provisions of that section.
305	To give notice to the company, within 20 days of his appointment the particulars relating to the office in other body corporate which are required to be specified under sub-s. (1) of s. 303.
314	Except with the previous consent of the company by a special resolution not to hold any other office or place of profit, (a) under the company, and (b) under any subsidiary of the company.
325	Not to appoint a managing agent for itself. After the commencement of the new Act the term of such managing agent shall, if it does not expire earlier, expire on 15th August, 1956.
326	Not to be appointed or re-appointed managing agent of a company except by the company in general meeting and with the approval of the Central Government.
328	To comply with the provisions of s. 328 regarding the terms of his appointment or re-appointment.
329	Not to vary the terms of the managing agency agreement except by a resolution of the company in general meeting and with the previous sanction of the Central Government.

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## Requirements thereof

- 330 Where a company has a managing agent at the commencement of the new Act, to vacate office on 15th August, 1960, if the term of office does not expire earlier or unless before that date he is re-appointed for a fresh term in accordance with the provisions of the new Act.
- 331 All provisions of the new Act, other than those relating to the term of his office shall apply to existing managing agents with effect from the commencement of the new Act.
- 332 After 15th August 1960, not to hold office as managing agent in more than ten companies; and the Central Government may permit him to do so with effect from that date in respect of ten only of such companies, as it may determine.
- 334 To vacate office subject to s. 340 in the cases specified in cls. (a) to (e) of s. 334.
- 335 To be suspended from office if a receiver is appointed for his property.
- 336 Subject to ss. 340 and 341 to vacate office in cases specified in cls. (a), (b) and (c) of s. 336 of conviction by a Court in India, after the commencement of the new Act, of any offence and sentence of imprisonment for six months and over.
- 337 To be removed from office by an ordinary resolution of the company in general meeting for fraud or breach of trust specified in cls. (i) to (iii) of s. 337.
- 338 To be removed from office by a special resolution of the company for gross negligence in, or for gross mismanagement of the affairs of the company or of any subsidiary thereof.
- 342 To cease to act as managing agent with effect from the date specified in his resignation letter or such later date as may be mutually agreed; but his resignation will not be effective until it is considered as provided in sub.s. (3) of s. 342.
- 343 Not to transfer his office without the approval of both the company in general meeting and the Central Government.
- 344 In the case of a public company or its subsidiary private company, an agreement made after the commencement of the Act providing for succession to the office of managing agent by inheritance or devise shall be void.
- 345 Where such a managing agency is heritable or devisable by agreement at the commencement of the new Act, the succession or devise will not take effect unless approved by the Central Government.



Sections

Requirements thereof

- 346** Where the managing agent of such a company is a firm or body corporate and any change takes place in its constitution, the managing agent is to cease to act as such on the expiry of 6 months from the date of such change, unless approval of the Central Government has already been secured.
- 347** To comply with the provisions of Schedule VIII.
- 348 to 353** Not to receive any remuneration in contravention of ss. 348 to 353 from a company other than a private company which is not a subsidiary of a public company.
- 354** Not to receive any office allowance from such a company, but may be re-imbursed in respect of any expenses incurred by him on behalf of the company and sanctioned by the Board of directors or by the company in general meeting.
- 356 & 357** Not to receive by the managing agent or his associate any commission or other remuneration from the company in respect of goods produced or services rendered by it except as provided in s. 356.
- 358** Not to receive by the managing agent or his associate any payment whatever from the company other than on account of expenses, if any, sanctioned under s. 354 in respect of purchases of goods in India or outside India, except as provided in s. 358.
- 359** To obtain authorisation by a resolution of the company in general meeting for retention by the managing agent or its associate of any commission or other remuneration earned or to be earned by him as the managing agent etc. of any other concern as provided in s. 359.
- 360** To obtain approval by special resolution of the company of any contract entered into with the managing agent or his associate for the sale, purchase etc. of any property, or for the underwriting of any shares or debentures to be issued or sold by the company, as provided in s. 360.
- 361** All contracts referred to in ss. 356 to 360 between the company and the managing agent or his associate in force at the commencement of the new Act to terminate on 1st March, 1958, unless they terminate earlier.
- 363** Where the managing agent or his associate receives any sum from the company, directly or indirectly by way of remuneration, rebate, commission, expenses or otherwise, (a) in the case of a public company or its subsidiary private company, in contravention of ss. 348 to 354 and ss. 356 to 361; (b) in the case of a private company which is not a subsidiary of a public company, in contravention of ss. 356 to 361; the managing agent or his associate is to account to the company for such sum as if he held it in trust for the company.

Sections	Requirements thereof
364	Any assignment of, or charge on, his remuneration will be void as against the company.
365 & 366	Not to receive any compensation from the company for loss of his office in the cases specified in cls. (a) to (h) of s. 365. As to the limit of compensation for loss of office, see s. 366.
367	Where his office ceases or is terminated, his liability to the company will continue and his rights and liabilities in any other capacity will not be affected.
368	To be subject to the control of the Board of directors and to restrictions contained in Schedule VII.
369	Not to receive any loan or guarantee from the company (other than private company which is not a subsidiary of a public company), in contravention of s. 369.
370	To comply with the provisions of s. 370.
372 & 373	To comply with the provisions of s. 372 and s. 373.
375	Not to engage in business competing with that of the managed company. For contravention of this provision to be liable as trustee for all profits and benefits accruing to him from such business.
376	Condition prohibiting reconstruction or amalgamation of the company except on continuance of the managing agent in the reconstructed or amalgamated company is to be void.
377	To comply with s. 577 regarding the appointment of directors by the managing agent.
416	At the time of entering into a contract on behalf of the company in which contract the company is an undisclosed principal, to make a memorandum in writing of the terms of the contract and to specify therein the person with whom it is entered into, and to deliver such memorandum to the company and to send copies thereof to each of the directors.
478/519	To be publicly examined under ss. 478 and 519.
538	To comply with the provisions of s. 538 in any mode of winding up of the company.
542	To be personally responsible for debts and other liabilities of the company where its business has been carried on with intent to defraud creditors or other persons or for any fraudulent purpose.

<b>Sections</b>	<b>Requirements thereof</b>
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| 543 | To repay or restore the money or property of the company with interest or to contribute sums to the assets of the company by way of compensation in respect of any misapplication, retainer, misfeasance or breach of contract mentioned in s. 543. |
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*N.B.—For other liabilities, see Table No. XXIV under the heading “Offences, Offenders and Maximum Punishment”.*

*As to the personal liability of a managing agent see Table No. XII under the heading “Where Personal Liability.”*

**ASSOCIATE IN RELATION TO A MANAGING AGENT.**

For definition, see s. 2 (3).

For other provisions, see ss. 239, 249, 261, 369 and 407.

**TABLE NO. IX**

**SECRETARIES AND TREASURERS' OBLIGATIONS AND LIABILITIES**

<b>Sections</b>	<b>Requirements thereof</b>
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- |     |  |
|-----|--|
| 378 | No individual to be appointed.   |
|     | Not to be appointed where the company has a managing agent.  |
| 379 | All provisions of the Act applicable to, or in relation to, a managing agent which is a firm or body corporate and to their associates shall apply to the secretaries and treasurers, subject to the following exceptions and modifications, namely :— |
| 380 | SS. 324, 330 and 332 are not to apply.   |
| 381 | S. 348 is to apply subject to the modification that for the words “ten per cent. of the net annual profits” therein, the words “seven and a half per cent. of the net annual profits” shall be substituted.  |
| 382 | Not to appoint any director of the company, and ss. 377 and 261 shall not apply to them or persons connected or associated with them.  |

Sections	Requirements thereof
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- 383 Unless and except to the extent authorised by the Board of directors, they are not to sell any goods or articles manufactured or produced by the company, or to purchase, obtain, or acquire machinery, stores, goods or materials for the purposes of the company, or to sell the same when no longer required for those purposes.

*N.B.—See Table No. VIII under the heading “Managing Agent’s Obligations and Liabilities”.*

*For other liabilities see Table No. XXIV under the heading “Offences, Offenders and Maximum Punishment”.*

*As to the personal liabilities, see Table No. XII under the heading “Where Personal Liability”.*

#### ASSOCIATE IN RELATION TO ANY SECRETARIES AND TREASURERS.

For definition, see s. 2 (4).

For other provisions, see ss. 239, 249, 261, 369 and 407 read with s. 379 (b).

### TABLE NO. X

#### MANAGER'S OBLIGATIONS AND LIABILITIES

Sections	Requirements thereof
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- 384 No public company or its subsidiary private company shall appoint as manager any firm, body corporate or association after the commencement of the new Act, or after the expiry of 6 months from such commencement, shall continue such appointment or employment.

- 385 No company shall after the commencement of the new Act, appoint or employ or continue to do so any person as manager specified in cls. (a) to (c) of sub-s. (1) of s. 385.

- 386 To comply with the provisions of s. 386 regarding the number of companies to which a person may be appointed manager.

- 387 Subject to the provisions of s. 198, not to receive remuneration either by way of monthly payment or by way of a specified percentage, exceeding 5 per cent. of the “net profits” of the company calculated in the manner laid down in ss. 349, 350 and 351.

Sections	Requirements thereof
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§88           The provisions of sections 310, 311 and 317 shall apply in relation to the manager as they apply in relation to a managing director of the company, and the provisions of s. 312 shall apply as they apply to a director thereof.

*N.B.—See Table No. VII under the heading “Managing Director’s or Whole Time Director’s Obligations and Liabilities”.*

*For other liabilities see Table No. XXIV under the heading “Offences, Offenders and Maximum Punishment”.*

*As to the personal liability, see Table No. XII under the heading “Where Personal Liability”.*

## TABLE NO. XI

### AUDITOR’S OBLIGATION AND LIABILITIES

Sections	Requirements thereof
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165 (4) Proviso	To certify the statutory report of the company so far as it relates to the shares allotted by the company, the cash received in respect thereof and the receipts and payments of the company on capital account.
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201	Save as provided in the Proviso to sub-s. (1) of s. 201, any provision in the articles, agreement or any other instrument for exemption from or indemnity against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust, shall be void.
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224 (6)	Where a casual vacancy is caused in the office of an auditor, it may be filled by the Board.
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An auditor appointed in a casual vacancy it to hold office only up to the conclusion of the next annual general meeting.

225	Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than the retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed. For details see s. 225.
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226	Save as provided in sub-s. (2) of s. 226 none but a chartered accountant can be appointed as auditor of a company. A body corporate and other persons mentioned in sub-ss. (3) and (4) s. 226 cannot be appointed as auditor.
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Sections	Requirements thereof
226 (5)	To vacate his office if the auditor becomes after his appointment, disqualified under sub-ss. (3) and (4) of s. 226.
227	To comply with the detailed provisions of s. 227 regarding his report on the accounts, balance sheet, profit and loss accounts etc. of the company.
228	To comply with sub-s. (2) of s. 228 regarding the accounts of a branch office of the company.
229	To comply with the provisions of s. 229 regarding the signature of the audit report, etc.
233	To incur penalty under s. 233 if the auditor's report is made or any document of the company is signed or authenticated otherwise than in conformity with the requirements of ss. 227 and 229.
477	To be summoned and examined under s. 277 and to comply with the Court's orders made under that section.
478	To be publicly examined under s. 478.
539	To incur penalty under s. 539.
543	To pay damages etc. in a misfeasance proceeding against him under s. 543.
545 (1)	To be prosecuted under sub-s. (1) of s. 545.
545 (7)	To give all assistance in connection with the prosecution of any other person under s. 545.

**TABLE NO. XII**  
**WHERE PERSONAL LIABILITY**

Sections	Requirements thereof
11 (4)	Every member of a company, association or partnership carrying on business in contravention of s. 11 shall be personally liable for all liabilities incurred in such business.
45	Members of a company are severally liable for debts where business is carried on with fewer than two members in the case of a private company, and fewer than seven members in the case of any other company.

Sections	Requirements thereof
62 & 607	To pay compensation by a director or other person specified in cls. (a) to (d) of sub-s. (1) of s. 62 to every person who subscribes for any shares or debentures on the faith of the prospectus containing any untrue statement therein.
69 (5)	By the directors to repay money with interest at 6 p.c.p.a. received from applicants for shares, if the provisions of sub-s. (5) of s. 69 are not complied with.
71 (3)	In case of contravention by a director of any of the provisions of s. 69 or 70 with respect to allotment, he is to compensate the company and the allottee for any loss, damages or costs which they have sustained thereby.
73	If the moneys received from applicants in pursuance of the prospectus is not repaid by the company as provided in sub-s. (2) of s. 73, the directors are to repay the same with interest at 5 p.c.p.a.
295 (5)	All persons who are knowingly parties to any contravention of sub-s. (1) or (3) of s. 295 regarding loans to directors, etc. shall be liable, jointly and severally, to the lending company for repayment of the loan and other sum mentioned in sub-s. (5) of s. 295.
314 (2)	If any office or place of profit under the company or its subsidiary is held in contravention of sub-s. (1) of s. 314, the director concerned shall be liable to refund to the company any remuneration received or the monetary equivalent of any perquisites or advantage enjoyed by him, in respect of such office or place of profit.
371 (2)	All persons who are knowingly parties to any contravention of s. 369 or 370 regarding loans to managing agent or to companies under the same management shall be liable, jointly and severally for repayment of the loan or other sum mentioned in sub-s. (2) of s. 371.
542	Persons who were knowingly parties to the carrying on of business with intent to defraud creditors of the company or any other persons or for any fraudulent purpose shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.
543	For any misapplication or retainer of any money or profits of the company, or misfeasance or breach of trust in relation to the company, a promoter, any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of company are to repay or restore the money or property with interest or to contribute sums to the assets of the company by way of compensation.

Sections	Requirements thereof
544	The liability under ss. 542 and 543 extends to partners or directors in the firm or the company, under the provision of s. 544.
553 (2)	If a voluntary liquidator retains for more than 10 days a sum exceeding Rs. 500 or such other amount as the Court authorises him to retain, he is (a) to pay interest at 12 p.c.p.a. on the amount so retained and also to pay such penalty as may be determined by the Registrar, (b) to pay any expenses occasioned by his default and (c) to have his remuneration disallowed.
555 (9)	Any liquidator retaining any money which should have been paid by him to the Companies Liquidation Account under s. 555, is (a) to pay interest at 12 p.c.p.a. on the amount retained and also such penalty as may be determined by the Registrar; (b) to pay any expenses occasioned by his default; and (c) where the winding up is by or under the supervision of the Court, to have his remuneration disallowed.

## TABLE NO. XIII

## WHAT THE BOARD OF DIRECTORS CANNOT DO

Sections	Requirements thereof
291, Provisos.	<p>The Board of directors cannot exercise any power or do any act or thing which is directed or required, whether by this Act or any other Act or by the memorandum or articles of the company, or otherwise to be exercised or done by the company in general meeting (For these, see Table No. XV under the heading "What a General Meeting of Company can Do by Ordinary Resolution").</p> <p>In exercising any such power or doing any such act or things the Board shall be subject to the provisions of any other Act, or memorandum or articles or regulations of the company including those made by the company in general meeting.</p>
293	In the case of a public company or its subsidiary private company, the Board cannot do any of the acts specified in cls. (a) to (e) of sub-s. (1) of s. 293, except with the consent of such company in general meeting and in accordance with the provisions of s. 293.
294	The Board cannot appoint a sole selling agent of the company for any area except in accordance with the provisions of s. 294.

*N.B.—See Table No. VI under the heading "Directors' Obligations and Liabilities".*



## TABLE NO. XIV

RESOLUTION OF THE BOARD OR ITS COMMITTEE BY CIRCULATION,  
WHAT CANNOT BE DONE BY

## Sections

## Requirements thereof

- 289** Such resolution cannot be passed, unless it has been circulated in draft with necessary papers to all the directors or to all the members of the committee, then in India, and to all other directors or members at their usual address in India, and has been approved by such of the directors in India or by their majority, as are entitled to vote on the resolution.
- 262** In the case of a public company or its subsidiary private company, a casual vacancy among the directors cannot be filled by such a resolution.
- 292** By such a resolution the following powers of the Board cannot be exercised: (a) to make calls on shareholders for unpaid share money, (b) to issue debentures, (c) to borrow money otherwise than on debentures, (d) to invest the company's funds, (e) to make loans and (f) to delegate to any committee of the Board or managing agent etc. the powers mentioned in cls. (c), (d) and (e) above to the extent specified in sub-ss. (2), (3) and (4) respectively of s. 292.
- 297** By such a resolution sanction cannot be accorded to contracts specified in cls. (a) and (b) of sub-s. (1) of s. 297, in which contracts any director etc. are interested.
- 299** By such a resolution disclosure of a director's interest in any contract or arrangement with the company cannot be taken or accepted.
- 308** By such a resolution a director's disclosure of his shareholdings under s. 308 cannot be taken or accepted.
- 316** By such a resolution a managing director cannot be appointed or employed in one more company as provided in sub-s. (2) of s. 316.
- 372 (4)** By such resolution investment in any shares or debentures of any other body corporate in the same group under sub-s. (2) of s. 372 cannot be sanctioned.
- 386** In the case of a public company or its subsidiary private company by such a resolution approval cannot be accorded to the appointment or employment of a manager in one more company, as provided in sub-s. (2) of s. 386.

**TABLE NO. XV**  
**WHAT A GENERAL MEETING OF COMPANY CAN DO BY**  
**ORDINARY RESOLUTION**

Sections.	Requirements thereof
22	To change the company's name in accordance with the provisions of s. 22.
61	To vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus.
79	To authorise the issue of shares at a discount in accordance with the provisions of s. 79.
81	To give direction contrary to provision of sub-s. (1) of s. 81 regarding further issue of capital.
94 (2)	To exercise the powers of altering the company's share capital under sub-s. (1) of s. 94.
98/32	To increase the nominal amount of its share capital and/or to provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up, when an unlimited company passes resolution for registration as a limited company.
106	To sanction an alteration of rights of holders of special classes of shares in accordance with the provisions of s. 106.
214	By a holding company to authorise representatives named in the resolution to inspect the books of account kept by any of its subsidiaries.
255	To appoint not less than two-thirds of the total number of directors of a public company or its subsidiary private company; and also the remaining directors of any such company and the directors generally of a private company, in default and subject to any regulations in its articles.
256	At the general meeting at which a director retires in accordance with the provisions of s. 256, to fill up the vacancy by appointing the retiring director or some other person in accordance with sub-ss. (3) and (4) thereof.
258	Subject to the provisions of ss. 252, 255 and 259, to increase or reduce the number of directors of the company within the limits fixed by its articles.
281	To appoint or approve the appointment of a director (in accordance with the provisions of s. 281) who has attained the age of 65 years, specifically declaring that the age limit shall not apply to him.

Sections	Requirements thereof
284	Subject to the provisions of s. 284, to remove a director before the expiry of his period of office, and to fill the vacancy by the appointment of another director in his stead at the same meeting provided special notice of the intended appointment has been given under sub-s. (2) of s. 284.
292 (5)	To impose restrictions and conditions on the exercise by the Board of directors of any of the powers specified in sub-s. (1) of s. 292.
293	Subject to the provisions of sub-s. (3) of s. 293, to give consent to the Board of directors of a public company or its subsidiary private company for exercise of the powers specified in cls. (a) to (c) of sub-s. (1) of s. 293.
294	In accordance with the provisions of s. 294, to approve or terminate the appointment of sole selling agents of the company made by the Board of directors.
313	To authorise the Board of directors, in accordance with the provisions of s. 313, to appoint alternate directors of the company.
326	To appoint or re-appoint a managing agent of the company, in accordance with the provisions of s. 326.
329	To vary the terms of a managing agency agreement in accordance with the provisions of s. 329.
337	To remove the company's managing agent for fraud or breach of trust specified in cls. (i) to (iii) of s. 337.
342 (5)	To accept resignation of the managing agent or to take such other action as may be deemed fit.
343	To approve a transfer of office by the managing agent subject to the approval of the Central Government.
353 (Proviso)	To pay the minimum remuneration under s. 198 to the managing agent in suitable instalments.
359	To authorise the managing agent or his associate to retain any commission or other remuneration earned or to be earned by him as the managing agent etc. of any firm etc. in respect of goods etc. specified in s. 359.
372 (3) and 373	To sanction the investment mentioned in sub-s. (3) of s. 372 or s. 373 subject to the approval of the Central Government.
460	To give directions to the liquidator as provided in s. 460.
484 (1) (a)	To require the company to be wound up voluntarily.

Sections	Requirements thereof
490	To appoint one or more liquidators in a members' voluntary winding up and to fix his or their remuneration.
491	To sanction continuance of the powers, if any, of the Board of directors in a members' voluntary winding up.
492	In a members' voluntary winding up to fill the vacancy in the office of liquidator, subject to any arrangement with the creditors.
502	In a creditors' voluntary winding up to nominate a person to be liquidator.
503 (2)	In a creditors' voluntary winding up to appoint a number of persons, not exceeding five, to act as members of the committee of inspection.

*N. B. As to where a special resolution is required, see notes to s. 189; and as to where a resolution requires special notice see notes to s. 190.*

## TABLE NO. XVI

### COPIES ETC. TO BE SENT TO PERSONS MENTIONED IN THE RESPECTIVE SECTIONS ON REQUEST.

Sections	Requirements thereof
39	Copies of (a) memorandum of association, (b) articles of association if there are any, (c) agreement in cl. (c) of sub-s. (1) of s. 39, (d) every other agreement and every resolution referred to in s. 192 if and in so far as they have not been embodied in the memorandum or articles.
113	The certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue thereof otherwise provide.
118	Copy of any trust deed for securing any issue of debentures.
163	Copies of the register of members, the index of members, the register and index of debenture holders and all returns prepared under ss. 159 and 160 together with the certificates and documents required to be annexed thereto under s. 161.
192	Where articles have been registered a copy of every resolution or agreement specified in cls. (a) to (f) of sub-s. (4) of s. 192 in force for the time being, embodied or annexed to the

## Sections

## Requirements thereof

articles ; and where articles have not been registered, a printed copy of every such resolution or agreement.

- 196 A copy of any minutes of proceedings of any general meeting of the company.
- 219 (2) A copy of the last balance sheet of the company and of every document required by law to be annexed or attached thereto, including the profit and loss account and the auditor's report.
- 223 A copy of the statement in the Form in Table F in Schedule I as provided in s. 223.
- 301 (5) Copies of the register of contracts, companies and firms in which the directors of the company are interested, maintained under s. 301.
- 302 (6) and (7) Copies of all contracts for the appointment of a manager, managing director, managing agent, or secretaries and treasurers, and also of any resolution or proposed resolution of the Board of directors appointing a manager or a managing or whole time director or varying any such previous contract or resolution.
- 307 (6) Copy of the register of directors' shareholding, etc. kept under s. 307.
- 362 Copies of registers referred to in ss. 356 to 360.
- 372 (8) Copies of the register of investments made in shares and debentures of bodies corporate in the same group kept in pursuance of sub-s. (5) of s. 372.
- 551 (3) Copy of statement filed by the liquidator in pursuance of the provisions of s. 551.

## TABLE NO. XVII

## BOOKS AND REGISTERS TO BE KEPT OR MAINTAINED BY A COMPANY

## Sections

## Requirements thereof

- 49 (7) \* Register of investment—where investments of the company in shares or securities are not held in its own name, the company shall enter in this register the particulars specified in cls. (a) and (b) of sub-s. (7) of s. 49.

Sections.	Requirements thereof
78	Share premium account under s. 78.
136	* Copy of every instrument creating any charge requiring registration under Part V.
143	* Register of charges—containing particulars mentioned in sub-s. (1) of s. 143.
150	* Register of members—containing particulars mentioned in sub-s. (1) of s. 150.
151	* Index of members s. 151.
152	* Register and index of debenture holders—containing particulars mentioned in sub-ss. (1) and (2) respectively of s. 152.
158 (2)	Foreign register of members and debenture holders under s. 157.
163	* Copies of annual returns prepared under ss. 159 and 160 together with the copies of certificates and documents required to be annexed thereto under ss. 160 and 161.
193/196	* Minutes books of (a)* proceedings of general meetings, (b) meetings of the Board of directors and (c) committees of the Board—containing particulars mentioned in sub-ss. (2) to (4) of s. 193.
209	* Books of account—containing particulars mentioned in sub-ss. (1) to (8) of s. 209.
301	* Register of contracts, companies and firms in which the directors of the company are interested—containing particulars mentioned in sub-ss. (1) and (3) of s. 301.
302 (6)	* All contracts entered into by the company for the appointment of a manager, managing director, managing agent or secretaries and treasurers.
303	* Register of directors, managing director, managing agent, secretaries and treasurers, manager and secretary—containing particulars mentioned in sub-s. (1) of s. 303.
307	* Register of directors' shareholdings etc.—containing particulars mentioned in s. 307.
356 and 357	Register of appointment of managing agent or his associate as selling agent of goods produced by the company or supply or rendering of services.
358	Register of special resolutions required by s. 358 in connection with the appointment of managing agent or his associate as buying agent for the company.

## Sections

## Requirements thereof

- 359        Register of contracts relating to the commission etc. of managing agent as buying or selling agent of other concerns—containing particulars mentioned in s. 359.
- 360        Register of contracts between managing agent or his associate and the company for the sale or purchase of goods or the supply of services etc. mentioned in s. 360.
- 372 (5)        \* Register of all investments made by the company in  
and (8)        shares and debentures of bodies corporate in the same group showing in respect of each investments the particulars mentioned in cls. (a) to (c) of sub-s. (5) of s. 372.

*N. B. The items marked with asterisk are to be kept at the registered office of the company.*

**TABLE NO. XVIII****RIGHT TO INSPECT REGISTERS, DOCUMENTS ETC. OF THE COMPANY**

Sections	Registers, Documents etc. Open to Inspection.	By whom
49 (8)	Register of investments kept under sub-s. (7) of s. 49 in shares or other securities not held by the company in its own name.	Member or debenture holder of the company
118 (4)	Trust deed for securing any issue of debentures.	Do.
144 (1)	Copies of instruments creating charges in pursuance of s. 136, and the register of charges kept in pursuance of s. 143.	Creditor or member
144 (2)	Register of charges kept in pursuance of s. 143.	Any other person
163 (2)	Registers and indexes of members and debenture holders, copies of all annual returns prepared under ss. 159 and 160, together with the copies of certificates and documents required to be annexed thereto.	Any member or debenture holder, or other person
176 (7)	Proxies lodged under the provisions of s. 176.	Member entitled to vote
196	Minute books of general meetings.	Any member
209 (4)	Books of account mentioned in s. 209.	Any director
214 (1)	Books of account kept by any subsidiary of holding company.	Representatives authorised by the holding company
230	Auditor's report.	Any member
301 (5)	Register of contracts, companies and firms in which directors are interested.	Do.
302 (6)	All contracts for the appointment of a manager, managing director, managing agent or secretaries and treasurers.	Do.



Sections.	Register Documents etc. open to Inspection.	By whom
302 (7)	Any resolution or proposed resolution of the Board of directors appointing a manager or a managing or whole time director or varying any previous contract or resolution of the company relating to such appointment.	Do.
304 (1)	Register of directors, managing director, managing agent, secretaries and treasurers, manager and secretary kept under s. 303.	Member or any other person
306 (2)	Registers kept by the Registrar under sub-s. (1) of s. 306.	Any member of the public
307 (5)	Register of directors' shareholdings etc. kept under s. 307.	(a) Any member or debenture holder (b) any person acting on behalf of the Central Government or of the Registrar
362	Registers referred to in ss. 356 to 360.	Any member
372 (8)	Register of investments made by a company in shares and debentures of bodies corporate in the same group kept under sub-s. (5) of s. 372.	Do.
454 (6)	Statement of affairs made by Official Liquidator as provided in s. 454.	Any person stating himself in writing to be a creditor or contributory.
461 (2)	Books kept by the liquidator under s. 461.	Creditor or contributory.
549	Books and papers of a company in winding up by or subject to the supervision of the Court.	Do. as provided in sub-s. (1) of s. 549

TABLE NO. XIX

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Sections	Register Documents etc. open to Inspection	By whom
551 (3)	Statement filed by the liquidator in pursuance of the provisions of s. 551.	Person stating himself in writing to be a creditor or contributory
610	Any document kept by the Registrar, being documents filed or registered by him or making a record of any fact as provided in s. 610.	Any person

TABLE NO. XIX

DOCUMENTS ETC. TO BE FILED WITH, OR DELIVERED TO,  
THE REGISTRAR

Sections	Documents etc. and Time within which	Whose obligation
17 (4)	Notice of alteration of the memorandum of association under s. 17.	Company
18 (1)	Certified copy of order confirming the alteration of the memorandum under s. 17, together with a printed copy of the memorandum, as altered—to be filed within 3 months from the date of the order.	Do.
18 (3)	Where the alteration of the memorandum under s. 17 involves a transfer of the registered office from one State to another, a certified copy of the confirming the alteration—with the Registrar of each of such States.	Do.
33	Memorandum of association, articles of association, agreements (if any) mentioned in cl. (c) of sub-s. (1) of s. 33, and a declaration of an advocate or other persons mentioned in sub-s. (2) of s. 33.	Do.
44 (1) (b)	If a private company alters its articles in such a manner that it ceases to be a private company,—a prospectus or a statement in lieu of prospectus as specified in sub-s. (2) of s. 44—within 14 days from the date of such alteration.	The private company

Sections	Documents etc. and Time within which	Whose obligation
60	A copy of the prospectus in accordance with the requirements of the provisions of s. 60.	Company other than a private company
70	A statement in lieu of prospectus in accordance with the provisions of s. 70—at least three days before the first allotment of any shares or debentures.	Do.
75	A return of allotments of shares in accordance with the requirements of s. 70—within 1 month after any allotment.	Company
95	Notice of (a) consolidation and division of share capital, (b) conversion of any shares into stock, (c) re-conversion of any stock into shares, (d) sub-division of share or shares, (e) redemption of any redeemable preference shares, or (f) cancellation of any shares, otherwise than in connection with a reduction of share capital, as required by sub-s. (1) of s. 95—within one month after doing any of these acts.	Do.
97	Notice of increase of share capital beyond the authorised capital or of members beyond the registered number in accordance with the requirements of s. 97—within 15 days after the passing of the resolution authorising the increase.	Do.
103	Order of the Court confirming reduction of share capital and certified copy of the order and minute approved by the Court mentioned in cls. (a) and (b) of sub-s. (1) of s. 103.	Do.
107 (5)	A copy of the order of Court passed under sub-s. (3) of s. 107 on an application by a dissentient shareholder—within 15 days after service on the company of that order.	Do.
125/134	Particulars of the charge specified in s. 125 together with the instrument creating the same or a copy thereof verified in the prescribed manner—within 21 days after the date of its creation.	Do. and any person interested in the charge
127/134	Prescribed particulars of the charge mentioned in s. 127 together with a copy of the instrument creating the same—within 21 days after the event mentioned in sub-s. (1) or its Proviso, of s. 127.	Do.

Sections	Documents etc. and Time within which	Whose obligation
128/134	In the case of a series of debentures entitling the holders <i>pari passu</i> , the particulars mentioned in s. 128—within 21 days after execution of the deed.	Do.
129/134	Particulars of the amount or rate per cent. of the commission etc. on debentures mentioned in s. 129 to be included in the particulars specified in ss. 125 and 128.	Do.
135	Particulars of modification of the above mentioned charges—within 21 days of such modification.	Company
137 (1)	Notice of the order for appointment, or appointment by a person, of a receiver or manager mentioned in sub-s. (1) of s. 137—within 15 days after the aforesaid order or appointment with the prescribed fee.	The person
137 (2)	Notice of ceasing to act as receiver or manager under the powers contained in any instrument.	Receiver or manager
138	Intimation of payment or satisfaction of the charge—within 21 days from the date of such payment or satisfaction.	Company
146 (2)	Notice situation of the registered office and of every change therein—within 28 days after the date of incorporation or date of the change.	Do.
149 (1) (d)	Duly verified declaration in the prescribed form by a director or secretary.	Do.
149 (2) (a)	A statement in lieu of prospectus.	Do.
149 (2) (c)	A duly verified declaration by a director or secretary in the prescribed form that cl. (b) of sub-s. (2) of s. 149 has been complied with.	Do.
156	Notice of rectification of the register of members—within 14 days from the date of order by the Court.	Company or person making application under s. 155 as the Court orders

Sections	Documents etc. and Time within which	Whose obligation
157 (2)	Notice of situation of the office where the foreign register is kept, in case of change of such situation or discontinuance of the register, notice of such change or discontinuance—within 1 month of the opening of the foreign register, or such change or discontinuance.	Company
159	Annual return of company having a share capital containing particulars specified in Part I of Schedule V as required by s. 159—within 42 days from the date on which each of the annual general meetings referred to in s. 166 is held.	Do.
160	Annual return of a company not having a share capital, containing particulars mentioned in s. 160—within 42 days from the day on which each of the annual general meetings referred to in s. 166 is held.	Do.
161	Certificate along with the annual return as required by sub-s. (2) of s. 161, (a) that the return states the facts correctly and completely, and (b) in the case of a private company also the matters specified in cl. (b) of sub-s. (2) of s. 161.	Do.
165	A copy of the statutory report certified as required by s. 165—immediately after copies thereof have been sent to the members of the company.	Board of directors
192	<p>A copy of every resolution or agreement mentioned below as required by sub-s. (1) of s. 192—within 15 days after the passing or making thereof, namely:—</p> <p>(a) special resolution ;</p> <p>(b) resolution agreed to by all members, but which, if not so agreed to would not have been effective unless passed as special resolution ;</p> <p>(c) any resolution of the Board or agreement executed by the company regarding the appointment, reappointment, renewal or variation thereof, of a managing director ;</p> <p>(d) any agreement relating to the appointment etc. of a managing agent or secretaries and treasurers or varying the terms thereof ;</p> <p>(e) resolutions or agreements mentioned in cl. (c) of sub-s. (4) of s. 192 ; and</p> <p>(f) resolutions requiring the company to be wound up voluntarily under sub-s. (1) of s. 484.</p>	Company

Sections	Documents etc. and Time within which	Whose obligation
220	Three copies of the balance sheet and the profit and loss account as required in sub-s. (1) of s. 220 together with a statement, if any, mentioned in sub-s. (2) thereof—at the same time as the copy of the annual return referred to in s. 161.	Company
234	Information or explanation required by the Registrar under sub-s. (1) of s. 234—within such time as may be specified in the Registrar's order.	Company, its officers, liquidator or foreign company
264	In the case of a public company or its subsidiary private company, consent in writing to act as director.	The proposed director
266 (1)	In the case of a company other than a private company, as required by sub-s. (1) of s. 266, (a) consent in writing to act as director, (b) undertaking in writing to take from the company his qualification shares, if any, and pay for them, or (c) affidavit to the effect that the aforesaid shares are registered in his name.	Do.
266 (4)	List of persons who have consented to be directors.	Applicant for registration of memorandum and articles
276	Intimation of choice of directorship under sub-s. (1) of s. 276—within 2 months from the commencement of the new Act.	Director
303 (2)	Return in the prescribed form containing the particulars specified, the register of directors etc., and a notification in the prescribed form of any change among the directors etc. or in any particulars contained in the said register, specifying the date of the change—within 28 days from the appointment of the first director, and of the happening of the change.	Company
391 (3)	Certified copy of an order sanctioning the compromise or arrangement under sub-s. (2) of s. 391.	Do.
394 (3)	Certified copy of an order passed by the Court under sub-s. (1) of s. 394—within 14 days after the making of the order.	Every company in relation to which the order is made

Sections	Documents etc. and Time within which	Whose obligation
404 (3)	Certified copy of every order of the Court under s. 397 or 398 altering or giving leave to alter memorandum or articles—within 15 days after the making of the order.	Company
421	An abstract in the prescribed form of his receipts and payments as required by s. 421—once in every half year where the receiver is appointed by a power conferred by any instrument and who has taken possession.	Receiver
445 (1)	A certified copy of the order of winding up made by the Court—within 1 month from the date of the making of the order.	Petitioner and company.
462 (4)	One copy of the audited account of the liquidator.	Court
466 (3)	Copy of order of the Court staying the winding up proceedings under sub-s. (1) of s. 466.	Company or as prescribed
481 (2)	Copy of the Court's order dissolving the company—within 14 days from the date of the order.	Liquidator
488 (2) (a)	Declaration of solvency made by the directors in case of a proposal to wind up the company voluntarily—before the date of passing the resolution for winding up.	Directors
493	Notice of appointment of liquidator made under s. 490, of vacancy in the office of liquidator and of the name of the liquidator or liquidators appointed to fill every such vacancy under s. 492—within 10 days of the event.	Company
497 (3)	Copy of the account and a return of the final meeting in a members' voluntary winding up—within 1 week after the meeting.	Liquidator
	A certified copy of the order deferring the date of dissolution of the company—within 21 days after the order.	Applicant for order
501 (1)	Notice of resolution passed by the creditors' meeting in a creditors' voluntary winding up—within 10 days of the passing of the resolution.	Company
509 (3)	A copy of the account and a return of the holding of the final meetings in a creditors' voluntary winding up—within 1 week after the date of the meetings.	Liquidator

Sections.	Documents etc. and Time within which	Whose obligation
509 (6)	A certified copy of the Court's order deferring the date of dissolution in a creditors' voluntary winding up—within 21 days after the order.	Applicant for the order
516 (1)	Notice of appointment of liquidator in the prescribed form in a voluntary winding up—within 21 days after the appointment.	Liquidator
518 (5)	A copy of the order staying the proceeding in a voluntary winding up under s. 518—forthwith.	Company or as prescribed
551 (1) and (2)	Statement under s. 551 in the prescribed form and containing the prescribed particulars of information as to the pending liquidation—within 1 month of the expiry of the year.	Liquidator
559 (2)	A certified copy of the order declaring the dissolution of a company void—within 21 days after the order.	Applicant for the order
560 (7)	Certified copy of the order passed by the Court under sub-s. (6) of s. 560 restoring the company to the register.	Applicant for the order
567	The documents of the Joint-Stock Companies specified in s. 567.	Company
568	The documents of any company not being a joint-stock company specified in s. 568.	Do.
592 (1) to (3)	Documents of a foreign company specified in sub-ss. (1) to (3) of s. 592—within 1 month of establishment of the place of business in India.	Foreign company establishing place of business in India
592 (4)	Documents and particulars of other foreign companies mentioned in sub-s. (4)—in accordance with provisions of Act VII of 1913.	Other foreign companies
593	A return containing the prescribed particulars of any alteration specified in s. 593—within 2 months in the case mentioned in cl. (a), (b) or (c), and within 1 month in the case mentioned in cl. (d) or (e) of s. 593, from the date of alteration.	Foreign company
594	Three copies of the documents specified in sub-s. (1) and three copies of the list mentioned in sub-s. (3) of s. 594.	Do.



Sections	Documents etc. and Time within which	Whose obligation
605	Copy of prospectus certified in accordance with the provisions of s. 605, together with documents mentioned in cls. (a) to (c) of sub-s. (1) and of sub-s (2) of that section.	Do.

*N.B.—As to the office of the Registrar where the document of a foreign company are to be filed, see s. 597.*

**TABLE NO. XX**  
**MATTERS REQUIRING SANCTION OR CONFIRMATION**  
**BY THE COURT**

Sections	Matters
17	Alteration of memorandum of association in respect of matters mentioned in sub-s. (1) of s. 17.
79	Issue of shares at a discount under s. 79.
89 (3)	Manner in which the provisions of sub-s. (1) of s. 89 relating to the reduction of disproportionately excessive voting rights in existing companies are to be complied with.
100	Reduction of share capital as provided in s. 100 <i>et seq.</i>
107	Variation of the rights of dissentient shareholders under s. 107.
141	Rectification of the register of charges and extension of time for registration under s. 141.
155	Rectification of the register of members under s. 155.
335	Continuance of power of the managing agent under the Proviso to sub-s. (1) of s. 355, where receiver has been appointed.
507	Exercise of the powers of the liquidator, as provided in s. 507.
545 (4)	Exercise of the liquidator's power to prosecute the delinquent officers and members, as provided in sub-s. (4) of s. 545.
546 (1)	Exercise by the liquidator of powers specified in cl. (a) of sub-s. (1) of s. 546.

**TABLE NO. XXI**  
**WHERE THE COMMON SEAL IS REQUIRED TO BE USED**

Sections	Purpose for which to be used
48 (1)	To empower any person as the company's attorney to execute deeds in or outside India.
50 (2)	To authorise any person in a territory outside India to affix the company's official seal to a deed or other document.
84	To prepare certificates of shares.
114	To issue a share warrant.

**TABLE NO. XXII**

**MATTERS REQUIRING CENTRAL GOVERNMENT'S  
SANCTION OR APPROVAL**

Sections	Matters requiring sanction or approval
21	Change of name by company.
22 (1) (a) & (b)	Change of name or new name by company under cls. (a) and (b) of sub-s. (1) of s. 22.
25	Registration of charitable or other company with limited liability without the addition to its name of the word "Limited" or the words "Private Limited."
25 (6) (c) & (d)	(a) Exemption from the obligation to send lists of its member to the Registrar, and (b) obligations laid on the company by s. 303 regarding keeping and sending return of particulars the register of directors etc.
79 (2) (ii)	Higher percentage of discount referred to in cl. (ii) of sub-s. (2) of s. 79.
89 (4)	Exemption, in respect of any shares issued by a company before 1st December, 1949, from the requirements of sub-ss. (1), (2) and (3) of s. 89 regarding termination of disproportionately excessive voting rights in existing companies.
114	Public company issuing share warrants.
198 (4) Proviso	An increase in the minimum remuneration of Rs. 50,000 to the directors, managing agents etc. referred to in sub-s. (4) of s. 198.
208 (3)	Payment of interest on paid up share capital as is provided in s. 208.
211 (3)	Exemption of any class of companies from compliance with any of the requirements of Schedule VI of the Act.
212 (8)	Exemption from complying with the provisions of s. 212 in relation to any subsidiary company.
224 (7)	Removing the auditor from his office before the expiry of his term.
239 (2)	Exercise by the inspector of his power of investigating into and reporting on the affairs of any body corporate or person referred to in cl. (b) (ii), (b) (iii), (c), or (d) of sub-s. (1) of s. 239.
250 (7)	Institution of prosecution under s. 250.
259	Any increase in the number of directors of a public company or its subsidiary private company, except in cases specified in cls. (a) and (b) of s. 259.

## Sections

## Matters requiring sanction or approval

- 268** Amendment of any provision relating to the appointment or re-appointment of a managing or whole time director of a public company or its subsidiary private company, not liable to retire by rotation.
- 269** In the above case, if the appointment is made for the first time after the commencement of the new Act by an existing company and after the expiry of 3 months from the date of incorporation by any other company—such an appointment.
- 274 (2)** The removal of disqualification of a director under sub-s. (2) of s. 274.
- 295 (1)** Making any loan etc. to any director etc. by a public company or its subsidiary private company etc. as mentioned in s. 295.
- 310** Amendment of any provision by a public company or its subsidiary private company, relating to the increase of remuneration of any director including a managing or a whole time director.
- 311** In the above case, if the terms of any re-appointment or appointment of a managing or whole time director made after the commencement of the new Act, purport to increase or have the effect of increasing his remuneration, such re-appointment or appointment.
- 316 (4)** Appointment of any person as managing director of more than two companies, as provided in sub-s. (4) of s. 316.
- 326 (1) (b)** Appointment or re-appointment of a managing agent under s. 326.
- 327 (c)** Exemption of a private company which is not a subsidiary of a public company from the application of ss. 328 to 331.
- 328 (1) (c) Proviso** Re-appointment of a managing agent at an earlier time than that specified in cl. (c) of sub-s. (1) of s. 328.
- 329** Resolution to be passed at a general meeting for varying the terms of a managing agency agreement.
- 332 (2)** Holding office as managing agent in not exceeding ten companies as provided in sub-s. (2) of s. 332.
- 343** Transfer of his office by a managing agent.
- 345** Where the managing agent is an individual, on his death or succession to the office by inheritance or devise, as provided in s. 345.
- 346** Where the managing agent of a public company or its subsidiary private company is a firm or body corporate, change of its constitution as provided in s. 346.

## Sections                      Matters requiring sanction or approval

347 (2) Proviso	Modification or limiting of the operation of sub-s. (2) of s. 347 in relation to any body corporate, as provided in 347.
352	Payment of addition remuneration to a managing agent under s. 352.
372 (3) and 373.	Investment in shares or debentures of any other body corporate in the same group in excess of the limits specified in sub-s. (2) (and proviso) of s. 372.
386 (4)	Appointment of any person as manager of more than two companies as provided in sub-s. (4) of s. 386.
439 (5) (Proviso)	Presentation of a petition for the winding up of a company by the Registrar on any of the grounds mentioned in sub-s. (5) of s. 439.
549 (1)	Inspection of books and papers by creditors or contributories after an order for winding up of a company by or subject to the supervision of the Court.
572	Change of name of a company for purposes of registration under Part IX of the Act.
578 (3) (d)	Altering any provision contained in any Act of Parliament of the United Kingdom, Royal Charter or Letters Patent relating to the company authorised to be registered under Part IX of the Act.

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*N.B.—See Table No. XXIII under the heading "Powers of Central Government".*

## TABLE NO. XXIII

### POWERS OF CENTRAL GOVERNMENT UNDER THE ACT

Sections	Powers
2 (39)	To notify in the Official Gazette a stock exchange, whether in or outside India, as a recognised stock exchange.
8	To declare an establishment not to be a branch office, as provided in s. 8.
10 (2)	To empower any District Court to exercise jurisdiction under the Companies Act with the limitations specified in sub-s. (2) of s. 10.
20	To declare a company's name to be undesirable.
22	To give the direction mentioned in cl. (b) of sub-s. (1) of s. 22.

## Sections

## Powers

- 25 To grant license under s. 25.
- 111 To hear appeals from a company's refusal of registration of transfer or transmission of shares or debenture, and to pass orders, as provided in s. 111.
- 158 (3) To direct that the provisions of cl. (b) of sub-s. (3) of s. 158 shall apply or cease to apply, to foreign registers kept in any State or country outside India.
- 167 To call the annual general meeting of a company, as provided in s. 167.
- 208 (4) To appoint, before sanctioning any payment of interest out of capital under s. 208, a person to inquire into and report on the circumstances of the case, and to require the company to give security for costs of the inquiry.
- 208 (5) To determine the period for which the payment of interest shall be made.
- 211 (4) To modify, in relation to a company, any of the requirements of the Act as to the matters to be stated in its balance sheet and profit and loss account.
- 213 To extend the last date of financial year, of annual return and of general meeting of a holding company so as to make it coincide with the financial year of its subsidiary.
- 224 (3) & (8) (a) To appoint an auditor where at an annual general meeting no auditors are appointed or re-appointed, and to fix his remuneration.
- 226 To make rules providing for the grant, removal, suspension or cancellation of auditors' certificates to persons in Part B States, as provided in cl. (b) of sub-s. (2) of s. 226.
- 235 To appoint inspectors to investigate the affairs of any company and to report thereon.
- 236 To require evidence in support of an application for the appointment of an inspector, and to require security from the applicants.
- 237 To appoint such inspectors in the circumstances mentioned in s. 237.
- 241 To receive the inspector's report and to perform the acts mentioned in s. 241.
- 242 To prosecute the offenders mentioned in s. 242.
- 243 On the inspector's report, to cause a petition for the winding up of the company etc. mentioned in s. 243 to be presented to the Court by any person authorised by the Central Government and/or to cause an application to be presented to the Court under s. 397 or 398 by such authorised person.

Sections	Powers
244	On the inspector's report to bring proceedings for recovery of damages or property as provided in s. 244, and to indemnify the company or body corporate against the costs or expenses of such proceedings.
245	In the first instance to defray the expenses of investigation by an inspector, and to recover the same from persons mentioned in sub-s. (1) of s. 245.
245 (3)	To give direction to the inspector under sub-s. (3) of s. 245.
247	To appoint inspector to investigate and report on the membership of any company and other matters mentioned in sub-s. (1) of s. 247, to define the scope of the inspection, to defray the expenses of the investigation or to direct the applicants for investigation to pay the same.
248	To require information from persons mentioned in s. 248 regarding the ownership of shares or debentures of a company or body corporate which acts or has acted as the managing agent or secretaries and treasurers of a company, as provided in s.
249	To appoint an inspector or to require information from any person for investigating whether any body corporate, firm or individual was or was not an associate of the managing agent or secretaries and treasurers of a company.
250	To impose restrictions on shares or debentures as provided in s. 250.
274 (2)	To remove the disqualification incurred by any person in virtue of cl. (d) or cl. (e) of sub-s. (1) of s. 274.
300	To direct by notification in the Official Gazette that sub-s. (1) of s. 300 shall not apply to a public company or its subsidiary private company, or shall apply thereto subject to such exception, modification and condition as may be specified in the notification.
324	To notify that companies engaged in specified classes of industry or business shall not have managing agent.
347	To direct by notification in the Official Gazette that a body corporate (not being a private company) acting as managing agent, shall not, even if its shares are dealt in, or quoted on, any recognized stock exchange, be exempt from the operation of sub-s. (1) of s. 347.
	To modify or limit the operation of sub-s. (2) of s. 347 in relation to any body corporate.
349	To direct exclusion of bounties and subsidies given by a public authority to company in computing its net profits, and to require deduction from profits certain taxes mentioned in s. 349.

Sections	Powers
369 (1) (b)	To declare that the Board of directors etc. are accustomed to act in accordance with the directions or instruction of the managing agent or his associate of a body corporate.
385	To remove by notification in the Official Gazette, the disqualification incurred by any person in virtue of cl. (a), (b) or (c) or sub-s. (1) of s. 385 as provided in that section.
396	To provide, by order notified in the Official Gazette, for amalgamation of companies in national interest.
399	To authorise less than the number of members specified in sub-s. (1) of s. 399 to apply for relief against oppression and mismanagement, and to require such member or members to give security for costs.
400	To receive notice and make representations to the Court under s. 400.
401	To apply to the Court or to authorise any person to do the same under s. 397 or 398.
407 (3)	To receive notice of intention to apply for leave mentioned in sub-s. (3) of s. 407.
408	To appoint directors to prevent oppression or mismanagement or to direct the company to amend its articles and make fresh appointments of directors as provided in s. 408.
409	To prevent change in the Board of directors likely to affect the company prejudicially, as provided in s. 409.
410	To constitute an Advisory Commission, as provided in s. 410.
411	To refer matters to the Advisory Commission.
412	To prescribe the form in which application is to be made to the Central Government under any of the sections mentioned in cl. (b) of s. 411.
439 (1) (f)	To authorise any person to present to the Court an application for winding up under s. 243.
448	To appoint Official Liquidator as provided in s. 448.
451	To receive, where the Official Liquidator becomes or acts as liquidator, such fees out of the assets of the company, as may be prescribed.
496	To extend the period within which the liquidator is required to call general meetings at the end of each year.
530 (1) (a)	To receive, as preferential payment, all revenue, taxes etc. as provided in cl. (a) of sub-s. (1) of s. 530.



Sections	Powers
244	On the inspector's report to bring proceedings for recovery of damages or property as provided in s. 244, and to indemnify the company or body corporate against the costs or expenses of such proceedings.
245	In the first instance to defray the expenses of investigation by an inspector, and to recover the same from persons mentioned in sub-s. (1) of s. 245.
245 (3)	To give direction to the inspector under sub-s. (3) of s. 245.
247	To appoint inspector to investigate and report on the membership of any company and other matters mentioned in sub-s. (1) of s. 247 to define the scope of the inspection, to defray the expenses of the investigation or to direct the applicants for investigation to pay the same.
248	To require information from persons mentioned in s. 248 regarding the ownership of shares or debentures of a company or body corporate which acts or has acted as the managing agent or secretaries and treasurers of a company, as provided in s. 248.
249	To appoint an inspector or to require information from any person for investigating whether any body corporate, firm or individual was or was not an associate of the managing agent or secretaries and treasurers of a company.
250	To impose restrictions on shares or debentures as provided in s. 250.
274 (2)	To remove the disqualification incurred by any person in virtue of cl. (d) or cl. (e) of sub-s. (1) of s. 274.
300	To direct by notification in the Official Gazette that sub-s. (1) of s. 300 shall not apply to a public company or its subsidiary private company, or shall apply thereto subject to such exception, modification and condition as may be specified in the notification.
344	To notify that companies engaged in specified classes of industry or business shall not have managing agent.
347	To direct by notification in the Official Gazette that a body corporate (not being a private company) acting as managing agent, shall not, even if its shares are dealt in, or quoted on, any recognized stock exchange, be exempt from the operation of sub-s. (1) of s. 347. To modify or limit the operation of sub-s. (2) of s. 347 in relation to any body corporate.
349	To direct exclusion of bounties and subsidies given by a public authority to company in computing its net profits, and to require deduction from profits certain taxes mentioned in s. 349.

Sections	Powers
369 (1) (b)	To declare that the Board of directors etc. are accustomed to act in accordance with the directions or instruction of the managing agent or his associate of a body corporate.
385	To remove by notification in the Official Gazette, the disqualification incurred by any person in virtue of cl. (a), (b) or (c) or sub-s. (1) of s. 385 as provided in that section.
396	To provide, by order notified in the Official Gazette, for amalgamation of companies in national interest.
399	To authorise less than the number of members specified in sub-s. (1) of s. 399 to apply for relief against oppression and mismanagement, and to require such member or members to give security for costs.
400	To receive notice and make representations to the Court under s. 400.
401	To apply to the Court or to authorise any person to do the same under s. 397 or 398.
407 (3)	To receive notice of intention to apply for leave mentioned in sub-s. (3) of s. 407.
408	To appoint directors to prevent oppression or mismanagement or to direct the company to amend its articles and make fresh appointments of directors as provided in s. 408.
409	To prevent change in the Board of directors likely to affect the company prejudicially, as provided in s. 409.
410	To constitute an Advisory Commission, as provided in s. 410.
411	To refer matters to the Advisory Commission.
412	To prescribe the form in which application is to be made to the Central Government under any of the sections mentioned in cl. (b) of s. 411.
439 (1) (f)	To authorise any person to present to the Court an application for winding up under s. 243.
448	To appoint Official Liquidator as provided in s. 448.
451	To receive, where the Official Liquidator becomes or acts as liquidator, such fees out of the assets of the company, as may be prescribed.
496	To extend the period within which the liquidator is required to call general meetings at the end of each year.
530 (1) (a)	To receive, as preferential payment, all revenue, taxes etc. as provided in cl. (a) of sub-s. (1) of s. 530.

Sections

Matters

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|----------------------|--|
| 534                  | To notify the rate of interest on floating charges under s. 584.   |
| 550 (3)              | To make rules under sub-s. (3) of s. 550 (a) to prevent destruction of books and papers of a company wound up and of its liquidator and (b) to enable any creditor or contributory to make representations to the Central Government in respect of the matters specified in cl. (a) of sub-s. (3) of s. 550 and to appeal to the Court from any direction given by the Central Government in the matter. |
| 555 (7) (b)          | To make an order for payment of money from the Companies Liquidation Account to persons entitled thereto.  |
| 594 (1)<br>(Proviso) | To direct, by notification in the Official Gazette, that in the case of any foreign company or class of foreign company, the requirements of cl. (a) of sub-s. (1) of s. 594 shall not apply, or shall apply subject to certain exceptions or modifications.   |
| 609                  | To appoint Registrars etc., to fix their salaries and to direct a seal or seals to be prepared for authentication of documents, as provided in s. 609.   |
| 613                  | To reduce, by order notified in the Official Gazette, the amount of fees, charges etc., as provided in s. 613.   |
| 620                  | To modify, by notification in the Official Gazette, the application of the Act in relation to Government Companies, as provided in s. 620.   |
| 621                  | To authorise a person to complain to Court in respect of offences against this Act.  |
| 637                  | To delegate, by notification in the Official Gazette any of its powers or functions under this Act, other than those specified in sub-s. (2) of s. 637, to such authority or officer, and subject to such conditions, restrictions and limitations, as may be specified in the notification.   |
| 641                  | To alter, by notification in the Official Gazette, any of the regulations, rules, tables, forms and other provisions contained in any of the Schedules of the Act, except Schedules XI and XII, subject to the provisions of s. 641.   |
| 642                  | By notification in the Official Gazette, to make rules (a) for the matters which by this Act are to be, or may be, prescribed by the Central Government: and (b) generally to carry out the purposes of the Act.   |

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*N.B.—For other powers of the Central Government's see Table No. XXII under the heading "Matters requiring Central Government's Sanction or Approval".*

## TABLE NO. XXIV

## OFFENCES, OFFENDERS AND MAXIMUM PUNISHMENT

Sections	Offence	Offender	Maximum Penalty
11 (5)	To become member of a company, association or partnership formed in contravention of s. 11.	Person becoming member	Fine of Rs. 1,000
22 (2)	Default in complying with direction given by the Central Government under cl. (b) of sub-s. (1) of s. 22 in connection with rectification of a company's name.	Company	Do.
25 (10)	Default in complying with sub-s. (9) of s. 25 in connection with the revocation of a licence.	Chamber of commerce	Fine of Rs. 500 for every day during default
39 (2)	Default in complying with requirements of s. 39 in connection with the giving to members copies of memorandum, articles, etc.	Company	Fine of Rs. 50 for each offence
40 (2)	Default in complying with s. 40 in connection with the noting of alteration in every copy of memorandum etc. issued.	Company and officer	Fine of Rs. 10 for each copy issued
44 (3)	Default in complying with sub-s. (1) or (2) in connection with alteration of articles of a private company.	Do.	Fine of Rs. 500 for every day of default
44 (4)	Filing prospectus or statement in lieu of prospectus on ceasing to be a private company, containing untrue statement.	Person who authorised the filing	Imprisonment for 2 years, or fine of Rs. 5,000, or both
49 (a)	Default in complying with any of the requirements of sub-s. (1) to (8) of s. 49 in connection with the investments being held in the company's own name.	Company and every officer	Fine of Rs. 5,000
56 (3)	Acting in contravention of sub-s. (3) of s. 56 relating to the issue of form of application for shares.	Person acting in contravention	Do.

Sections	Offence	Offender	Maximum Penalty.
59 (1)	Issuing prospectus in contravention of s. 57 or 58.	Company and person contravening	Do.
60 (5)	Issuing prospectus without complying with the provisions of s. 60.	Do.	Do.
63	Issing prospectus on or after 1st April, 1956 containing any untrue statement.	Person authorising the issue	Imprisonment for 2 years, or fine of Rs. 5,000, or both
63	Fraudulently inducing persons to invest money, as specified in s. 68.	Person inducing	Imprisonment for 5 years, or fine of Rs. 10,000, or both
69 (4)	Contravening sub-s. (4) of s. 69 relating to the deposit in Scheduled Bank of money received from applicants of shares.	Promoter etc. responsible for contravention	Fine of Rs. 5,000
70 (4)	Acting in contravention of sub-s. (1) or (2) of s. 70 relating to the prohibition of allotment in certain cases unless statement in lieu of prospectus has been delivered to the Registrar.	Company and director permitting the contravention	Fine of Rs. 1,000
70 (5)	Authorising delivery of statement in lieu of prospectus for registration which includes any untrue statement.	Person authorising	Imprisonment for 2 years, or fine of Rs. 5,000 or both
72 (3) and (4)	Contravening sub-ss. (1) and (2) of s. 72 regarding applicants for, and allotment of, shares and debentures.	Company and officer who is in default	Fine of Rs. 5,000
73 (3) and (6)	Default in complying with sub-s. (3) of s. 73 relating to the keeping of moneys received under sub-ss. (1) and (2) of s. 73 in a separate bank account with a Scheduled Bank.	Do.	Do.

Sections	Offence	Offender	Maximum Penalty
75 (4)	Default in complying with s. 75 relating to the return as to allotments.	Officer who is in default	Fine of Rs. 500 for every day of default
76 (5)	Default in complying with s. 76 regarding prohibition of payment of commissions, discounts, etc.	Company and officer	Fine of Rs. 500
77 (4)	Acting in contravention of sub-ss. (1) to (3) of s. 77 regarding purchase by company, or loans by it for purchase of its own or its holding company's shares.	Do.	Fine of Rs. 1,000
79 (4)	Default in complying with sub-s. (4) of s. 79 regarding particulars of discount to be contained in the prospectus.	Do.	Fine of Rs. 50
80 (6)	Failure to comply with s. 80 regarding the issue of redeemable preference shares.	Do.	Fine of Rs. 1,000
89 (3)	Default in complying with sub-s. (3) of s. 89, as to the making of application to the Court as provided therein.	Do.	Do.
95 (3)	Default in complying with sub-s. (1) of s. 95 regarding giving notice to the Registrar of consolidation of share capital, conversion of shares into stock etc.	Do.	Fine of Rs. 50 for every day of default
97 (3)	Default in complying with s. 97 regarding filing with the Registrar notice of increase of share capital or of members.	Do.	Do.
105	Concealing the name of any creditor entitled to object to the reduction of capital, misrepresentating the nature or amount of the debt or claim of any creditor; or abetting or being privy to any such concealment or misrepresentation.	Officer	Imprisonment for 1 year, or fine or both
107 (5)	Default in complying with sub-s. (5) of s. 107 in forwarding to the Registrar a copy of the Court's order within 15 days.	Company and officer	Fine of Rs. 50

Sections	Offence	Offender	Maximum Penalty
111 (2)	Default in complying with sub-s. (2) of s. 111 relating to the sending of notice within 2 months of refusal to register transfer or transmission of shares or debentures.	Company and officer	Fine of Rs. 50 for every day of default
113 (2)	Default in complying with sub-s. (1) of s. 113 in having ready for delivery the certificates of all shares, debentures and debenture stock within 3 months after allotment or transfer thereof.	Do.	Fine of Rs. 500 for every default
115 (6)	Default in complying with any of the requirements of s. 115 relating to the share warrants and making entries in the register of members.	Do.	Fine of Rs. 50 for every day of default
116	Personating an owner of any share or interest in a company or of any share warrant or coupon or receiving or attempting to receive any money.	Person so doing	Imprisonment for 3 years and also fine
118 (2)	Refusing a copy of a trust deed securing any issue of debentures or forwarding the same, within 7 days as provided in sub-s. (1) of s. 118.	Company and officer	Fine of Rs. 50 and a further fine of Rs. 20 for every day of default
127 (2)	Default in complying with sub-s. (1) of s. 127, that is, in delivering to the Registrar the prescribed particulars etc. for registration within 21 days after the date of acquisition of the property subject to any charge.	Do.	Fine of Rs. 500
133 (2)	Default in complying with s. 133 relating to the endorsement of certificate of registration or debenture or certificate of debenture-stock.	Person delivering the debenture, etc.	Fine of Rs. 1000
137 (3)	Default in complying with sub-s. (1) or (2) of s. 137 relating to the entry in register of charges the appointment of a receiver or manager of property and cessation thereof.	Person making the default	Fine of Rs. 50 for every day of default

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Sections	Offence	Offender	Maximum Penalty
142 (1)	Default in filing with the Registrar for registration the particulars (a) of any charge created by the company, (b) of the payment or satisfaction of a debt in respect of a charge, or (c) of the issues of a series of debentures requiring registration with the Registrar.	Company and officer	Fine of Rs. 500 for every day of default
142 (2)	Default in complying with the other requirements of the Act as to the registration of any charge.	Do.	Fine of Rs. 1000
143 (2)	Omitting any entry required to be made under sub-s. (1) of s. 143 in the company's register of charges.	Officer	Fine of Rs 500
144 (3)	Refusing inspection of copies of instruments creating charges and of company's register of charges.	Company and officer	Fine of Rs. 20 for every day of refusal
146 (4)	Default in complying with s. 146 as to the having a registered office and giving notice thereof within 28 days of its situation, removal etc.	Do.	Fine of Rs. 50 for every day of default
147 (2)	Failure to paint or affix the company's name as directed in cl. (a) of sub-s. (1) of s. 147.	Do.	Fine of Rs. 50 for every day of failure
147 (3)	Failure to comply with cl (b) or cl. (c) of sub-s. (1) of s. 147.	Company	Fine of Rs. 500
147 (4)	Doing any of the acts specified in cls. (a) to (d) of sub-s. (4).	Officer or person doing the act	Do.
148 (2)	Default in complying with sub-s. (1) of s. 148 regarding publication of authorised as well as subscribed and paid up capital.	Company and officer	Fine of Rs. 1000
149 (6)	Commencing business or exercising borrowing powers in contravention of s. 149.	Person responsible for contravention	Fine of Rs. 500 for every day of contravention



Sections	Offence	Offender	Maximum Penalty
150 (2)	Default in complying with sub-s. (1) of s. 150 regarding keeping the register of members and entering therein the particulars specified in cls. (a) to (d) thereof.	Company and every officer	Fine of Rs. 50 for every day of default
151 (4)	Default in complying with sub-s. (1) or (2) or (3) of s. 151 regarding index of members.	Do.	Fine of Rs. 50
152 (3)	Default in complying with sub-s. (1) or (2) of s. 152 regarding register and index of debenture holders.	Do.	Do.
154 (2)	Closing the register of members or debenture holders in contravention of s. 154.	Do.	Fine of Rs. 500 for every day of closure
157 (3)	Default in complying with sub-s. (2) of s. 157 as to the filing within 1 month from the date of opening of a foreign register notice of situation of the office where the register is kept and of change and discontinuance thereof.	Company and officer	Fine of Rs. 50 for every day of default
158 (9)	Default in complying with sub-s. (4) of s. 158 regarding transmitting to the company's registered office in India copy of every entry in the foreign register, and keeping at such office a duplicate of the foreign register.	Do.	Fine of Rs. 50
162	Failure to comply with ss. 159, 160 and 161 regarding the annual return.	Do.	Fine of Rs. 50 for every day of default
163 (5)	Refusing inspection of or making extract from the registers and returns or sending copy as required by s. 163.	Do.	Do.
165 (9)	Default in complying with s. 165 regarding statutory meeting and statutory report.	Director or other officer	Fine of Rs. 500
168	Default in complying with s. 166 or s. 167 regarding the annual general meeting and the directions of the Central Government.	Company and officer	Fine of Rs. 5,000

Sections	Offence	Offender	Maximum Penalty
176 (2)	Default in complying with sub-s. (2) of s. 176 as respects any meeting.	Officer	Fine of Rs. 500
176 (4)	Issuing invitations to appoint proxies at the company's expense.	Do.	Fine of Rs. 1,000
188 (8)	Default in complying with s. 188 in the matter of circulation of members' resolutions.	Do.	Fine of Rs. 5,000
192 (5)	Default in complying with sub-s. (1) of s. 192 as to the filing with the Registrar within 15 days copies of resolutions or agreements certified by an officer.	Company and officer	Fine of Rs. 20 for every default
192 (6)	Default in complying with sub-s. (2) or (3) of s. 192 as to the embodying in the articles issued copies of resolutions or agreements, or sending to members printed copies thereof.	Do.	Fine of Rs. 10 for each copy
193 (6)	Default in complying with s. 193 in respect of any general meeting or Board meeting etc.	Do.	Fine of Rs. 50
196 (3)	Refusal of inspection of minute books of general meetings under sub-s. (1) or failure to furnish to members within 7 days with copy of minutes thereof.	Do.	Fine of Rs. 500
197 (2)	Circulating or advertising any report of proceedings of a general meeting in contravention of sub-s. (1) of s. 197.	Do.	Fine of Rs. 500
202 (1)	An undischarged insolvent discharging functions of a director, managing agent etc. or promoting, forming or managing any company.	Undischarged insolvent	Imprisonment for 2 years or fine of Rs. 5,000, or both
203 (7)	Acting in contravention of the Court's order made under s. 203 restraining fraudulent persons from managing companies.	Person contravening	Do.
207	Failure to distribute dividends within 3 months.	Director, managing agent etc.	Simple imprisonment for 7 days and fine or both

Sections	Offence	Offender	Maximum Penalty
209 (5)	Failure to take steps to secure compliance with s. 209.	Managing agent etc. specified in sub-s. (6) of s. 209	Fine of Rs. 1,000
209 (7)	Default in complying with s. 209.	Person charged with the duty of complying	Do.
210 (5)	Failure to take steps to comply with s. 210.	Director	Imprisonment for 6 months, or fine of Rs. 1000 or both
210 (6)	Default in seeing that s. 210 is complied with.	Person charged by the Board	Do.
211 (7)	Failure by person referred to in sub-s. (6) of s. 209 to take steps to secure compliance with s. 210 by the company respecting the accounts laid before the general meeting and with other requirements of the Act as to matters to be stated in the accounts.	Person referred to in s. 209 (6)	Do.
211 (8)	Failure to do so by any other person charged by the managing agent etc. with the duty of seeing that s. 211 and other requirements mentioned above are complied with.	Person so charged	Do.
212 (9)	Failure by person referred to in s. 209 (6) to take steps to comply with s. 212.	Person referred to in s. 209	Do.
212 (10)	Default in doing so by any other person charged by the managing agent etc. with the duty of seeing that the provisions of s. 212 are complied with.	Person charged	Do.

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Sections	Offence	Offender	Maximum Penalty
217 (5)	Failure by a director to take steps to comply with sub-ss. (1) to (3) or by a chairman of the Board to comply with sub-s. (4) of s. 217.	Director or chairman	Imprisonment for 6 months or fine of Rs. 2000, or both
217 (6)	Default by any other person, charged by the Board of directors to see that sub-ss. (1) to (3) are complied with, in doing so.	Such other person	Do.
218	Issing circulating or publishing a copy of a balance sheet or profit and loss account not signed as required by s. 215, or without there being annexed or attached thereto a copy of (i) the profit and loss account, (ii) any accounts, reports or statements are required so to be under s. 212, (iii) the auditor's report, and (iv) the Board's report referred to in s. 217.	Company and officer	Fine of Rs. 500
219 (3)	Default in complying with sub-s. (1) of s. 219 as to the sending, not less than 21 days before the general meeting, copies of balance sheet etc. to the members, debenture holders and trustees for the debenture holders.	Do.	Do.
219 (1)	Default in complying with the demand for a copy of any document under sub-s. (2) of s. 219, within 7 days after the making thereof.	Do.	Do.
220 (3)	Default in complying with sub-ss. (1) and (2) of s. 220 relating to the copies of balance sheet etc. to be filed with Registrar.	Do.	Fine of Rs. 50 for every day of default
221 (4)	Default in performing the duty of the officer concerned to make disclosure of payments etc. as provided in sub-ss. (1) to (3) of s. 221.	person making the default	Imprisonment for 6 months or fine of Rs. 5,000 or both
223 (4)	Default in complying with any of the requirements of s. 223 by a limited banking company, an insurance company or a deposit, provident or benefit society.	Such Company and officer thereof	Fine of Rs. 50 for every day of default

Sections	Offence	Offender	Maximum Penalty
224 (4)	Failure to give notice within 7 days to the Central Government as provided in sub-ss. (3) and (4) of s. 224.	Company and officer	Fine of Rs. 500
232	Default in complying with any of the provisions in ss. 225 to 231 regarding auditor.	Do.	Do.
233	Default in complying by auditor and other person with the requirements of ss. 227 and 229.	Auditor and Person	Fine of Rs. 1,000
234 (4) (a)	Refusal or neglect by company and person referred to in sub-ss. (2) or (3) of s. 234 to furnish information or explanation mentioned therein.	Company and such person	Fine of Rs. 50
240 (3)	Refusal by any of the persons referred to in sub-s. (1) of s. 240 (a) to produce to an inspector any book or paper (b) to answer questions put by the inspector.	Such person	Punishment for contempt of Court
248 (4) and 249 (2)	Failure to give information under s. 248 regarding persons having an interest in company, or body corporate or firm acting as managing agent thereof, and making any false statement in connection therewith.	Person guilty	Imprisonment for 6 months, or fine of Rs. 5,000, or both
250 (5)	Exercising any right to dispose of any shares on which restrictions have been imposed by s. 250; voting in respect of any such shares; and failing to give notice of such restrictions.	Person doing these acts	Imprisonment for 6 months, or fine of Rs. 5,000, or both
250 (6)	Issuing shares in contravention of restrictions imposed by s. 250.	Company and officer	Fine of Rs. 5,000
266 (4)	Filing with the Registrar a list of directors in which occurs the name of a person who has not consented to be a director.	Person filing	Fine of Rs. 500
272	Acting as director after 2 months from the date of his appointment without holding his qualification shares.	Such director	Fine of Rs. 50 for every day of so acting
279	Holding office or acting as director of more than 20 companies in contravention of ss. 275 to 278.	Do.	Fine of Rs. 5,000 in respect of each company after 20

Sections	Offence	Offender	Maximum Penalty
282 (2)	Failing to give notice of his age, or acting as director under any invalid appointment or which has terminated by reason of his age.	Do.	Fine of Rs. 50 for each day of default
286 (2)	Failure to give notice to every director of every meeting of the Board of directors.	Officer	Fine of Rs. 100
295 (4)	Contravening sub-s. (1) or (3) of s. 295 in respect of loans to directors etc.	Person contravening	Fine of Rs. 5,000 or simple imprisonment for 6 months
299 (4)	Failure to comply with sub-s. (1) or (2) regarding disclosure of interests by director.	Director	Fine of Rs. 5,000
300 (4)	Contravening s. 300 regarding prohibition of interested director to participate or vote in Board's proceedings.	Do.	Do.
301 (4)	Default in complying with sub-s. (1), (2) or (3) of s. 301 as to the keeping of the register of contracts, companies and firms in which directors are interested.	Company and officer	Fine of Rs. 500
302 (5)	Default in complying with sub-ss. (1) to (4) of s. 302 regarding disclosure to members of director's interest in contract appointing manager, etc.	Do.	Fine of Rs. 1,000
303 (3)	Default in complying with sub-s. (1) or (2) as to keeping and sending to the Registrar a return of the register of directors etc.	Do.	Fine of Rs. 50 for every day of default
304 (2) (a)	Refusing inspection of the register of directors etc.	Do.	Fine of Rs. 50
305	Failure to disclose by the directors etc. within 20 days of their appointment the particulars relating to the office in the other body corporate required to be specified under sub-s. (1) of s. 303.	Director etc.	Fine of Rs. 500
307 (7)	Default in complying with sub-s. (7) of s. 307 relating to the production of the register of directors' shareholdings etc. at the commencement of every annual general meeting.	Company and officer	Do.

Sections	Offence	Offender	Maximum Penalty
307 (8)	Default in complying with sub-s. (1) or (2) of s. 307 as to keeping etc. of the register of directors' shareholdings etc. or refusal of any inspection thereof or default in sending a copy thereof.	Company and officer	Fine of Rs. 5,000 and a further fine of Rs. 20 for every day of default
308 (3)	Failure to comply with sub-s. (1) or (2) of s. 308 regarding giving of notice to the company of a director's shareholdings.	Person in default	Imprisonment for 2 years, or fine of Rs. 5,000 or both
320 (3)	Failure to comply with s. 320 relating to the payment to a director for loss of office etc. in connection transfer of shares.	Director or person in default	Fine of Rs. 250
322 (3)	Default in adding the statement or giving the notice mentioned in sub-s. (2) of s. 322.	Director, managing agent etc.	Fine of Rs. 1,000, and damages
332 (5)	Acting as managing agent of more than 10 companies in contravention of s. 332.	Person or acting	Fine of Rs. 1,000. in respect of each company in excess of 10 for each day of so acting
347 (3)	Default in complying with the provisions of Schedule VIII of the Act.	Managing agent	Rs. 50 for every day of default
371 (1)	Contravening s. 369 or 370 relating to loans to the managing agent or to companies under the same management.	Any person contravening	Fine of Rs. 5,000, or simple imprisonment for 6 months
372 (7)	Default in complying with sub-s. (5) or (6) of s. 372 as to the keeping of a register of investments made by the company in shares and debentures of body corporate in the same group.	Company and officer	fine of Rs. 500

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Sections	Offence	Offender	Maximum Penalty
374	Default in complying with s. 372 or 373 regarding the aforesaid investments.	Officer	Fine of Rs. 5,000
391 (5)	Default in complying with sub-s. (4) of s. 391 as to the annexing of a copy of the Court's order to a copy of memorandum etc. issued.	Company and officer	Fine of Rs. 10 for each copy issued
393 (4)	Default in complying with any of the requirements of s. 393 regarding sending of the information as to compromises etc. with creditors and members.	Company and officer (including) liquidator and trustee for debenture holders	Fine of Rs. 5,000
393 (5)	Failure to give notice to the company of the matters relating to himself for the purposes of s. 393.	Director, managing agent etc.	Fine of Rs. 500
394 (3)	Default in complying with sub-s. (3) of s. 394 as to the obligation of filing a certified copy of the Court's order with the Registrar.	Company and officer	Fine of Rs. 50
404 (4)	Default in complying with sub-s. (3) of s. 404 as to the filing with the Registrar a certified copy of every order altering memorandum or articles.	Do.	Fine of Rs. 5,000
407 (2)	Acting as director etc. in contravention of cl. (b) of sub-s. (1) of 407.	Director etc. so acting	Imprisonment for 1 year, or fine of Rs. 5,000 or both
414	Refusing or neglecting to produce books or other documents required by the Advisory Commission under s. 413.	Person in default	Imprisonment for 2 years, also fine
416 (3) (b)	Default in complying with the requirements of s. 416 regarding agent's contracts in which the company is an undisclosed principal.	Person entering into the contract and officer	Fine of Rs. 200
420	Contravention of ss. 417, 418 and 419 regarding employees' securities, provident funds etc.	Officer and Trustee of provident fund	Fine of Rs. 500



Sections	Offence	Offender	Maximum Penalty
423	Default in complying with the requirements of s. 421 or 422 regarding the filing of receiver's accounts and invoices etc.	Company and officer including receiver	Fine of Rs. 200
445 (1)	Default in complying with sub-s. (1) of s. 445 as to the obligation of filing a copy of the winding up order with the Registrar within 1 month from the date of order.	Petitioner or company and officer	Fine of Rs. 100 for each day of default
454 (5)	Default in complying with the requirements of s. 454 regarding statements of affairs to be made to the Official Liquidator.	Person in default	Do.
454 (7)	Any person untruthfully stating himself to be a creditor or contributory.	Person so stating	As for offence under s. 182 I.P.C.
481 (3)	Default in forwarding a copy of the order of dissolution of a company to the Registrar within 14 days from the date thereof.	Liquidator	Fine of Rs. 50 for every day of default
485 (2)	Default in complying with sub-s. (1) of s. 485 regarding publication of resolution to wind up voluntarily within 14 days thereof.	Company and officer	Do.
488 (3)	Making declaration of solvency under s. 488 without reasonable grounds.	Director making the declaration	Imprisonment for 6 months or fine of Rs. 5000. or both
493 (3)	Default in complying with sub-s. (1) or (2) of s. 493 as to giving the notice of appointment of liquidator to the Registrar within 10 days.	Company and officer (including the liquidator)	Fine of Rs. 100 during every day of default
495 (2)	Failure to comply with sub-s. (1) of s. 495 regarding the calling of the creditors' meeting in case of insolvency of the company.	Liquidator	Fine of Rs. 500
496 (2)	Failure to comply with sub-s. (1) of s. 496 regarding the calling of general meeting at the end of each year.	Do.	Fine of Rs. 100 for each failure

Sections	Offence	Offender	Maximum Penalty
497 (3)	Default in sending to the Registrar a copy of the account and making to him a return of the final meeting and dissolution within 1 week after the meeting.	Liquidator	Fine of Rs. 50 for every day of default
497 (6)	Default in delivering to the Registrar a certified copy of the Court's order deferring the date of dissolution of the company within 21 days after the order.	Applicant to the Court	Fine of Rs. 100 for every day of default
497 (7)	Failure to call a general meeting as required by s. 497.	Liquidator	Fine of Rs. 500
500 (6)	Default by company in complying with sub-ss. (1) and (2) regarding calling and advertisement of notice of the creditors' meeting, by the Board of directors in complying with sub-s. (3) and by any director in complying with sub-s. (4) of s. 500.	Company officer and each of the directors	Fine of Rs. 100
501 (2)	Default in complying with sub-s. (1) of s. 501 as to the giving of notice of resolutions passed by creditors' meeting to the Registrar within 10 days.	Company and officer	Fine of Rs. 50 for every day of default
508 (2)	Failure to comply with sub-s. (1) of s. 508 regarding the liquidator's duty to call meetings of the company and of creditors at the end of each year.	Liquidator	Fine of Rs. 100 for each failure
509 (3)	Default in sending to the Registrar a copy of the account and making a return of the holding of the final meeting and dissolution as provided in sub-s. (3) of s. 509.	Do.	Fine of Rs. 50 for each default
509 (6)	Default in delivering to the Registrar a certified copy of the Court's order deferring the date of dissolution of the company.	Applicant to the Court including the liquidator	Fine of Rs. 100 for every default
509 (7)	Failure to call a general meeting of the company or of the creditors as required by s. 509.	Liquidator	Fine of Rs. 500

Sections	Offence	Offender	Maximum Penalty
513 (3)	Any body corporate acting as liquidator of a company.	Director etc. of the body corporate	Fine of Rs. 1000
514	Giving corrupt inducement for securing appointment as liquidator.	Person so giving	Do.
516 (2)	Failure to comply with sub-s. (1) of s. 516 as to publishing in the Official Gazette and delivering to the Registrar notice of appointment as liquidator within 21 days thereof.	Liquidator	Fine of Rs. 50 for every day of default
538 (1)	Offences mentioned in cls. (m), (n) and (o) of sub-s. (1) of s. 538.	Past and present officer	Imprisonment for 5 years, or fine or both
538 (1)	Offences mentioned in any other clause of sub-s. (1) of s. 538.	Do.	Imprisonment for 2 years, or fine or both
538 (2)	Pawning, pledging or disposing of property amounting to offence under cl. (o) of sub-s. (1) of s. 538.	Person pawning etc.	Imprisonment for 3 years, or fine or both
539	Falsification, secretion or mutilation or destruction of books, papers or securities.	Officer or contributory	Imprisonment for 7 years, and fine
540	Committing any of the fraudulent acts mentioned in cls. (a), (b) and (c) of s. 540.	Officer	Imprisonment for 2 years, and fine
541 (1)	Default in keeping proper accounts as mentioned in sub-s. (1) of s. 541.	Officer	Imprisonment for 1 year
542 (3)	Carrying on business with fraudulent intent or purpose as mentioned in sub-s. (1) of s. 542.	Person so doing	Imprisonment for 2 years or fine of Rs. 5000 or both

Sections	Offence	Offender	Maximum Penalty
547 (2)	Default in complying with sub-s. (1) of s. 547 as to including in invoices etc. a statement that the company is being wound up.	Company, officer, liquidator, receiver or manager	Fine of Rs. 500
550 (4)	Acting in contravention of any rules or directions of the Central Government as mentioned in sub-s. (3) of s. 550.	Person so acting	Imprisonment for 6 months fine of Rs. 5000, or both
551 (4)	Untruthfully stating himself to be a creditor or contributory for the purpose of inspecting etc. the statement mentioned in s. 351 (1).	Person so stating	Punishment for offence under s. 182 I.P.C.
551 (5)	Failure to comply with any of the requirements of s. 551 regarding information as to pending liquidation.	Liquidator	Fine of Rs. 500 for every day of default
559 (2)	Failure to file certified copy with the Registrar of the Court's order declaring dissolution of a company void within 21 days thereof.	Applicant for the order	Fine of Rs. 500 for every day of default
598	Failure to comply with any of the provisions of ss. 592 to 597.	Company and officer or agent	Fine of Rs. 1000 and of Rs. 100 for every day of default
600	[See offences under ss. 118, 127 and 209].		
606	Contravention of any of the provisions of ss. 603, 604 and 605, relating to prospectus.	Person responsible for the contravention	Imprisonment for 6 months or fine of Rs. 5000, or both
610 (4)	Untruthfully stating himself to be a member or creditor for purposes of cl. (ii) of proviso to sub-s. (1) of s. 610.	Person so stating	Fine of Rs. 500

Sections	Offence	Offender	Maximum Penalty
513 (3)	Any body corporate acting as liquidator of a company.	Director etc. of the body corporate	Fine of Rs. 1000
514	Giving corrupt inducement for securing appointment as liquidator.	Person so giving	Do.
516 (2)	Failure to comply with sub-s. (1) of s. 516 as to publishing in the Official Gazette and delivering to the Registrar notice of appointment as liquidator within 21 days thereof.	Liquidator	Fine of Rs. 50 for every day of default
538 (1)	Offences mentioned in cls. (m), (n) and (o) of sub-s. (1) of s. 538.	Past and present officer	Imprisonment for 5 years, or fine or both
538 (1)	Offences mentioned in any other clause of sub-s. (1) of s. 538.	Do.	Imprisonment for 2 years, or fine or both
538 (2)	Pawning, pledging or disposing of property amounting to offence under cl. (o) of sub-s. (1) of s. 538.	Person pawning etc.	Imprisonment for 3 years, or fine or both
539	Falsification, secretion or mutilation or destruction of books, papers or securities.	Officer or contributory	Imprisonment for 7 years, and fine
540	Committing any of the fraudulent acts mentioned in cls. (a), (b) and (c) of s. 540.	Officer	Imprisonment for 2 years, and fine
541 (1)	Default in keeping proper accounts as mentioned in sub-s. (1) of s. 541.	Officer	Imprisonment for 1 year
542 (3)	Carrying on business with fraudulent intent or purpose as mentioned in sub-s. (1) of s. 542.	Person so doing	Imprisonment for 2 years or fine of Rs. 5000 or both

Sections	Offence	Offender	Maximum Penalty
547 (2)	Default in complying with sub-s. (1) of s. 547 as to including in invoices etc. a statement that the company is being wound up.	Company, officer, liquidator, receiver or manager	Fine of Rs. 500
550 (4)	Acting in contravention of any rules or directions of the Central Government as mentioned in sub-s. (3) of s. 550.	Person so acting	Imprisonment for 6 months, fine of Rs. 5000, or both
551 (4)	Untruthfully stating himself to be a creditor or contributory for the purpose of inspecting etc. the statement mentioned in s. 351 (1).	Person so stating	Punishment for offence under s. 182 I.P.C.
551 (5)	Failure to comply with any of the requirements of s. 551 regarding information as to pending liquidation.	Liquidator	Fine of Rs. 500 for every day of default
559 (2)	Failure to file certified copy with the Registrar of the Court's order declaring dissolution of a company void within 21 days thereof.	Applicant for the order	Fine of Rs. 500 for every day of default
598	Failure to comply with any of the provisions of ss. 592 to 597.	Company and officer or agent	Fine of Rs. 1000 and of Rs. 100 for every day of default
600	[See offences under ss. 118, 127 and 209].		
606	Contravention of any of the provisions of ss. 603, 604 and 605, relating to prospectus.	Person responsible for the contravention	Imprisonment for 6 months or fine of Rs. 5000, or both
610 (4)	Untruthfully stating himself to be a member or creditor for purposes of cl. (ii) of proviso to sub-s. (1) of s. 610.	Person so stating	Fine of Rs. 500

Sections	Offence	Offender	Maximum Penalty
615 (6)	Failure to comply with order of the Central Government made under sub-s. (1) or (4) relating to the furnishing of information or statistics.	company and officer	Imprisonment for 3 months, or fine of Rs. 1000, or both
628	Making false statement etc in any return, report etc. specified in s. 628.	Person making	Imprisonment for 2 years and fine
629	Giving false evidence as mentioned in s. 629.	Person giving	Imprisonment for 7 years and fine
630 (1)	Wrongfully obtaining possession of a company's property or wrongfully withholding it or misapplying the same.	Officer or employee	Fine of Rs. 1000
630 (2)	Default in complying with the Court's order passed under sub-s. (2) of s. 630 for delivering up or refunding the property.	Officer or employee	Imprisonment for 2 years
631	Improperly using the words "Limited" or "Private Limited" or any contraction etc. thereof in the name in which trade or business is carried on.	Person so using	Fine of Rs. 1000 for every day of using

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## ABBREVIATION OF REPORTS &c.

- A.** (preceded by year)—All India Reporter (A.I.R.) Allahabad.  
**A.C.** (preceded by year)—Law Reports, Appeal Cases, House of Lords.  
**A. & E. or Ad. & El.**—Adolphus & Ellis's Reports.  
**A.E.R. or All E.R.**—All England Reports preceded by year.  
**Aj.** (preceded by year)—(A.I.R.) Ajmer.  
**All.**—Allahabad Series, I.L.R. Since 1937 preceded by year.  
**Andhra** (preceded by year)—(A.I.R.) Andhra.  
**A.L.J.**—Allahabad Law Journal.  
**App. Cas.**—Law Reports, Appeal Cases, House of Lords.  
**Ass.** (preceded by year)—(A.I.R.) Assam.  
**Atk.**—Atkyns' Reports.  
**B.** (preceded by year)—A.I.R., Bombay.  
**B. & Ad.**—Barnewall and Adolphus Reports.  
**B. & C.**—Barnewall and Cresswell's Reports.  
**B. & S.**—Best and Smith's Reports.  
**Beav.**—Bevan's Reports.  
**Bl.op.** (preceded by year)—(A.I.R.) Bhopal.  
**Bil.** (preceded by year)—(A.I.R.) Bilaspur.  
**Bing.**—Bingham's Reports.  
**Bing, N.C.**—Bingham's New Cases.  
**B.L.R.**—Bengal Law Reports.  
**B.L.R. O.C.**—Do., Original Civil.  
**Bom.**—Bombay Series, I.L.R. Since 1937 preceded by year.  
**Bom. H.C.R.**—Bombay High Court Reports.  
**Bom. H.C.R.O.C.**—Do., Original Civil.  
**Bom. L.R.**—Bombay Law Reports.  
**Buckley**—Buckley's Companies Act (Eng.).  
**Bur. L.J.**—Burmah Law Journal.  
**Bur. L.T.**—Burma Law Times.  
**C.L.C.**—Company Law Committee.  
**C.L.C.R.**—Company Law Committee's Report.  
**C.** (preceded by year)—A.I.R., Calcutta.  
**Cal.**—Calcutta Series, I.L.R. Since 1937 preceded by year.  
**Car. & Kir.**—Carrington and Kirwan's Reports.  
**C.B.**—Common Bench Reports.  
**C.B.N.S.**—Do. New Series.  
**Ch.** (preceded by year)—Law Reports, Chancery Division.  
**Ch. App.**—Law Reports, Chancery Appeals.  
**Ch. D.**—Law Reports, Chancery Division.  
**C.L.J.**—Calcutta Law Journal.  
**C.L.R.**—Calcutta Law Reports.  
**C.P.**—Law Reports, Common Pleas.  
**C.P.D.**—Do. Common Pleas Division.  
**Cr. L. J.**—Criminal Law Journal.  
**C.W.N.**—Calcutta Weekly Notes.  
**Dacca** (preceded by year)—All India Reports (A.I.R.) Dacca.  
**De G. & J.**—De Gex and Jones Reports.  
**De G. F. & J.**—De Gex, Fisher and Jones' Reports.  
**De G. J. & S.**—De Gex, Jones and Smith's Reports.  
**D.L.R.**—Dominion Law Reporter.  
**Dr. & Sm.**—Drewry & Smale's Reports.  
**Drew.**—Drewry's Reports.  
**E. & B. or El. & Bl.**—Ellis & Blackburn's Reports.  
**E.B. & E.**—Ellis, Blackburn and Ellis's Reports.  
**E.P.** (preceded by year)—(A.I.R.) East Punjab.  
**Eq.**—Law Reports, Equity.  
**Ex.**—Exchequer Courts Reports.  
**Exch.**—Exchequer Reports.  
**Ex. D.**—Law reports, Exchequer Division.  
**F. or Fraser**—Court of Sessions, Scotland.

- F.C. (preceded by year)—A.I.R. Federal Court.  
 F.L.J.—Federal Law Journal.  
 Giff.—Giffard's Reports.  
 Gore-Browne—Sir Francis Gore-Browne's Joint-Stock Companies.  
 Ha.—Hare.  
 Hals.—Halsbury's Laws of England, Vol. 5, Companies.  
 Hals. (Hailsh.)—Do. Hailsham Edition.  
 H. & M.—Hemming and Miller's Reports.  
 H. & N.—Hurlstone and Norman's Reports.  
 H.L.—Law Reports, English and Irish Appeals, House of Lords.  
 H.L.C.—Clark's Reports, House of Lords.  
 H.P. (preceded by year)—(A.I.R.) Himachal Pradesh.  
 Hyd. (preceded by year)—(A.I.R.) Hyderabad.  
 I.A.—Law Reports, Indian Appeals.  
 I.C.—Indian Cases.  
 I.C.L.R.—Irish Common Law Reports.  
 Ind. Jur. N.S.—Indian Jurist, New Series.  
 I.R.—(preceded by year)—Irish Reports.  
 I.R.C.P.—Irish Reports, Common Pleas.  
 Ir. L.R.—Irish Law Reports.  
 J. & K. (preceded by year)—(A.I.R.) Jammu and Kashmir.  
 J.C.R.—(Parliamentary) Joint Committee's Report.  
 J.P.—Justice of the Peace.  
 K. & J.—Kay and Johnson's Reports.  
 Kar. (preceded by year)—(I.L.R.) Karachi series.  
 Kay—Kay's Reports.  
 K.B. (preceded by year)—Law Reports, King's Bench Division.  
 Kutch (preceded by year)—(A.I.R.) Kutch.  
 L. (preceded by year)—A.I.R. Lahore.  
 Lah.—Lahore Series, I.L.R. Since 1937 preceded by year.  
 L.J.—Law Journal (Eng.).  
 L.L.J.—Lahore Law Journal.  
 L.R.A. Civ.—Law Reporter, Allahabad, Civil.  
 L.R.C.P.—Law Reports, Common Pleas.  
 L.T.—Law Times Reports (Eng.).  
 Luck.—Lucknow Series, I.L.R.  
 M. (preceded by year)—A.I.R., Madras.  
 Mac. & G.—Macnaghten and Gordon's Reports.  
 Macq.—Macqueen's Scotch Appeals.  
 Mad.—Madras Series, I.L.R. Since 1937 preceded by year.  
 Man. & Gr.—Manning & Granger's Reports.  
 Manipur (preceded by year)—(A.I.R.)—Manipur.  
 Mans.—Manson's Bankruptcy and Company cases.  
 M. & W.—Meeson and Welby's Reports.  
 M.B. (preceded by year)—(A.I.R.) Madhya Bharat.  
 Meg.—Megone's Companies Acts cases.  
 M.I.A.—Moore's Indian Appeals.  
 M.L.J.—Madras Law Journal.  
 M.L.W.—Madras Law Weekly.  
 M.L.T.—Madras Law Times.  
 Moo. P.C. or Moo. P.C.C.—Moore's Privy Council Cases.  
 M.W.N.—Madras Weekly Notes.  
 Mys. (preceded by year)—(A.I.R.) Mysore.  
 N. (preceded by year)—A.I.R. Nagpur.  
 Nag. (preceded by year)—Nagpur Series, I.L.R.  
 N.I.—North Ireland Reports.  
 N.U.C. (preceded by year)—(A.I.R.) New Unreported Cases.  
 O. (preceded by year)—A.I.R. Oudh.  
 O.L.R.—Oudh Law Reports.  
 O.W.N.—Oudh Weekly Notes.  
 Or. (preceded by year)—(A.I.R.) Orissa.  
 P. or Pat (preceded by year)—A.I.R. Patna.

- Palmer—Palmer's Company Law.  
 Pat.—Patna Series, I.L.R.  
 Pat. L.J.—Patna Law Journal.  
 P.C. (preceded by year)—A.I.R.,  
   Privy Council.  
 Pepsu. (preceded by year)—(A.I.R.)  
   Pepsu.  
 Pesh. (preceded by year)—A.I.R.,  
   Peshwar.  
 Ph. Phillip's Reports.  
 P.L.R.—Punjab Law Reporter.  
 P.L.T.—Patna Law Times.  
 P.R.—Punjab Records.  
 Punj. (preceded by year) (A.I.R.)  
   Punjab.  
 P.W.R.—Punjab Weekly Reporter.  
 Q.B. (preceded by year)—Law Re-  
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 Q.B.—Queen's Bench Reports.  
 Q.B.D.—Queen's Bench Division.  
 R. (preceded by year)—A.I.R.,  
   Rangoon.  
 Raj. (preceded by year)—(A.I.R.)  
   Rajasthan.  
 Rang.—Rangoon Series, I.L.R. Since  
   1937 preceded by year.  
 Ry. Can. Cas.—Railway and Canal  
   Cases.
- S. (preceded by year)—A.I.R., Sind.  
 Sau. (preceded by year)—(A.I.R.)  
   Saurashtra.  
 S.C. (preceded by year)—Court of  
   Sessions Cases, Scotland.  
 S.C. preceded by year, from 1950)—  
   A.I.R., Supreme Court.  
 Sc L.R.—Scottish Law Reports.  
 Sim.—Simon's Reports.  
 Sim. (preceded by year)—(A.I.R.)  
   Simla.  
 S.J. or Sol. Jo.—Solicitors' Journal.  
 Sm. L.C.—Smith's Leading Cases.  
 T.L.R.—The Times Law Reports.  
 T.R.—Term Reports.  
 Trav.-Coch. (preceded by year)—  
   (A.I.R.) Travancore-Cochin.  
 Vern.—Vernon's Reports.  
 V. P. (preceded by year)—(A.I.R.)  
   Vindhya Pradesh.  
 W.N. (preceded by year)—Weekly  
   Notes (Eng.).  
 W.R.—Weekly Reporters (Suther-  
   land).  
 W.R. (Eng.)—Weekly Reporter  
   (English).  
 Y.C.—Young & Collier's Reports.



## THE COMPANIES ACT, 1956

No. I of 1956

## ARRANGEMENT OF SECTIONS

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# THE COMPANIES ACT, 1956

## ACT NO. I OF 1956

(Received the assent of the President on 18th January, 1956)

**An Act to consolidate and amend the law relating to companies and certain other associations.**

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows :—

For Statement of Objects and Reasons, see Gazette of India, Extraordinary dated September 2, 1953, Part II, Section 2, pages 804 *et seq.*; for Notes on Clauses, *ibid* pp. 808 *et seq.*, for Report of the Joint Committee see *ibid*, dated and May, 1955 Part II sec. 2, pp. 241 *et seq.*

1. **History of company law in England** :—In England the formation of joint-stock companies for trading and other purposes dates back several centuries (1). The East India Company was formed in 1600 in the reign of Queen Elizabeth, but up to 1844 companies were incorporated either by Royal Charter or by special Acts of Parliament, for the Companies Act, 1844 for the first time made provision for incorporation and registration of companies without the necessity of a Royal Charter or special Act of Parliament. The privilege of limited liability was not however granted till 1855. In 1856 a codifying law was passed followed by an amending Act in 1857. The law was again codified in 1862. This was a comprehensive Act and a large number of important decisions in English Courts were passed under this Act. Between that year and 1908 several amending Acts were passed. They were consolidated by the Companies (Consolidation) Act, 1908 which will be referred to in the following pages as the English Act of 1908. A consolidating English Act (19 & 20 Geo. 5, c. 29) was again passed in 1929 which consolidated all the amending Acts passed between 1908 and 1928. This Act came into operation on the 1st of November, 1929.

Recently an Amending Act, *viz.*, English Companies Act, 1947 (10 & 11 Geo. 6, Ch. 47) was passed in England consisting of 123 sections and 9 schedules. Of these only some 25 sections or parts of sections and parts of 2 schedules were brought into force on December 1, 1947, and the British Government brought into force the remaining provisions of the aforesaid Act after passing another consolidating Act in 1948 (11 & 12 Geo. 6, c. 38) which came into effect on 1st July, 1948.

2. **History of company law in India** :—In India following the English Companies Act of 1844 (7 and 8 Vict., c. 110) an Act for "Registration of Joint-Stock Companies" was, for the first time, enacted in the year 1850 (2). Every unincorporated company of partners associated under a deed containing a provision that

(1) Gore-Browne, 36th ed., p. 1.

(2) Act XLIII of 1850.

## INDIAN COMPANY LAW

the shares in the stock or business of the said company were transferable without the consent of all the partners, and also every company established for some literary, scientific or charitable purpose, which did not carry on any business for the pecuniary benefit of any of the proprietors or shareholders, were entitled to registration under this Act. The Supreme Courts of Calcutta, Madras and Bombay were authorised to order such registration.

**3. Salient features of earliest company legislation :—**Although in the last mentioned Act the privilege of limited liability was not conferred on the members, several important provisions relating to the management of joint-stock companies were, for the first time, enacted: e.g., provisions relating to—holding of one or more general meetings every year; holding of extraordinary general meetings upon the requisition of seven or more members; prohibition as to purchase by the company of its own shares or grant of loan to any person on the security of such shares; prohibition of and restriction to granting loans to the directors and officers of the company or their becoming security or guarantee for any loan; half-yearly audit and report by auditors on balance-sheet and profit and loss account. There were provisions regarding transfer of shares. Trusts were not recognized. Suits by or against a company registered under the Act (3) were allowed to be instituted in its registered name. The company was permitted to sue, and be sued by, its shareholders, and thus its distinct entity was recognized. Unpaid capital was a debt to the company. In the case of insolvent companies there were provisions like the winding up proceedings, and the directors might be examined on oath as provided in the present Act. Ratable contributions were to be realised from the shareholders for payments of the company's debts. Liability of past members was indicated; and finally, the company was to be dissolved. Thus the Act of 1850 (3) may be said to be the nucleus around which subsequent Companies Acts developed, though strictly speaking they were all enacted on the lines of English Companies Acts.

**4. Indian Acts between 1857 and 1913 :—**In 1857 an "Act (4) for the incorporation and regulation of Joint-Stock Companies and other Associations either with or without limited liability of the members thereof" was passed; but under this Act the privilege of limited liability was not extended to any company formed for the purpose of banking or insurance (5). This disability was removed by Act VII of 1860 passed on the lines of the English Act of 1857. Then following the English Act of 1862 a comprehensive Act (6) was passed in India in 1866 for consolidating and amending "the laws relating to the incorporation, regulation and winding up of Trading Companies and other Associations." This Act was recast in 1882 (7) embodying the amendments that were made in the company law in England up to that time.

Between the years 1882 and 1913 the following amending Acts were passed in India.

*Act VI of 1887*—providing for priority of debts in the winding up of a company.

*Act XII of 1891*—making some verbal corrections and introducing the word "hundi" after the word 'bill' in s. 144, cl. (f) of Act VI of 1882.

*Act XII of 1895*—giving power to companies to alter their objects or forms of constitution subject to confirmation by the High Court.

*Act IV of 1900*—authorizing certain companies to keep branch register of members in the United Kingdom.

*Act IV of 1910*—authorizing payment of interest out of capital and re-issue of redeemed debentures.

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(4) Act XIX of 1857.

(5) *Ibid.*, s. 1 (proviso).

(6) Act X of 1866.

(7) Act VI of 1882.

**5. Act VII of 1913 :—**Then following the English Companies (Consolidation) Act, 1908 the Companies Act VII of 1913 was passed in India in 1913 which was, as were the previous Acts, almost a *verbatim* reproduction of the English Act (8). Some minor amendments (9) were later on effected to the Indian Act.

**6. Act XXII of 1936 :—**The most extensive amendments, chiefly on the lines of the new provisions introduced in the English Companies Act of 1929, were made by the Indian Companies (Amendment) Act, 1936 which came into operation on 15th January, 1937.

**7. Subsequent Amendments :—**Thereafter the following further amendments were made:—Act XX of 1937 amending s. 93 and repealing sub-s. (1C) of that section; the Government of India (Adaptation of Indian Laws) Order, 1937 amending ss. 6, 7, 8, 11, 87C, 109, 232, 245 and 286, and inserting cl. (17) in s. 2, and the new ss. 2A, 42A and 289A; Act II of 1938 amending ss. 17, 34, 86D, 86L, 87D, 102, 130, 134, 153A, 237, 277, 277D, 277E, 277F, 277I, 277M, 284, regulations 56, 77, 106, 109, 116 of Table A, Form I in the Second Schedule and Form F in the Third Schedule; Act XXXIV of 1939 amending ss. 83, 107 and 207; Act XXXII of 1940 amending ss. 152 and 208C; Act XXXVI of 1940 inserting the new s. 244B; Act XXVI of 1941 amending ss. 104 and 282B; Act XVII of 1942 omitting s. 54 and amending s. 153; Act XXI of 1942 amending s. 277F; Act XXX of 1943 amending ss. 132 and 151, reg. 107 of Table A and Form F in the Third Schedule; Act IV of 1944 inserting the new s. 277HH, substituting the new s. 277I for s. 277I and amending s. 277L both introduced by the amending Act XXII of 1936; Act IV of 1945 adding sub-s. (6) to s. 282B; Act VI of 1945 amending ss. 131A and 151; Act XIII of 1946 adding proviso to sub-s. (2) s. 282B; and the India (Adaptation of Existing Indian Laws) order 1947 and the Pakistan (Adaptation of Existing Pakistan Laws) order, 1947 making amendments in various sections of the Act. Thereafter verbal alterations were made in a large number of sections in (1) India by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 which came into force on 23rd March, 1948, and by the Adaptation of Laws Order, 1950 which came into force on 26th January, 1950; and in (2) Pakistan by the Adaptation of Central Acts and Ordinances Order, 1949 which came into force on 26th March, 1949. By the Banking Companies Act X of 1949 the whole of Chapter XA, which had been introduced by Act XXII of 1936, was repealed, its provisions having mostly been incorporated in the former. By promulgating an Ordinance, namely, the Indian Companies (Amendment) Ordinance, 1951, the Central Government took extensive powers to intervene in the affairs of a company and extended the powers of the Court by enacting ss. 86J, 87AA, Proviso to 87B, 87BB, 87CC, 153C, 153D and 289B. This Ordinance was subsequently replaced by Act LII of 1951. Lastly by Act LI of 1952, s. 91B was amended by inserting a new sub-section (4) therein. See Introduction, para 3.

It may be noted that the contents of the above paras headed "History of Company Law in India," "Salient features of the earliest company legislation" and "Indian Acts between 1857 and 1913" have been reproduced almost *verbatim* in the Company Law Committee's Report (*vide* pages 16 and 17 thereof) hereinafter referred to as "C. L. C. Report" or "C. L. C. R."

**8. Present Act :—**The present Act has been based largely on the recommendations of the Company Law Committee modified in particular matters which have been noted under the relevant sections. The compulsory provisions and allied matters in Table A of the previous Act have been incorporated in the sections of the Act, and certain unnecessary provisions thereof have been omitted. The sections of the

(8) In re Mirza Ahmed [1924] M.W.N. 582, 83 I.C. 94.

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Act as altered and the new sections introduced have been re-arranged with a view to follow the sequence in the formation, growth and decay of companies. For further light see the Statement of Objects and Reasons printed in Appendix A.

The Bill for the present Act was introduced in the Lok Sabha on 2nd September, 1953 and the Joint Committee of both Houses of Parliament was appointed on 3rd May, 1954 in the Lok Sabha and concurred in by the Rajya Sabha on 13th May following. The Joint Committee made considerable alterations in the Bill which have also been noted under the relevant sections. Its Report was published in the Gazette of India Extraordinary dated 2nd May, 1955, Part II, Sec. 2, pp. 241 *et seq.*

During the passage of the Bill through Parliament the Lok Sabha made considerable addition and alteration in it and the Rajya Sabha made two minor alterations. These have been noted under the respective sections.

**9. Preamble :—**The preamble is an excellent aid to the construction of an ambiguous Act. It is a key to its construction (10). Where a word or words or a sentence in an Act are capable of two meanings, then a meaning consonant with the preamble should be preferred, but the preamble cannot be used to cut down the scope and plain meaning of the provisions of an Act (11). No doubt a preamble can be looked at when the section is ambiguous and it supplies a key to the mind of the legislature and indicates what its intention was, but where the language of the section is clear, a preamble cannot control its provisions (12). A preamble cannot be taken to have cut down the express provisions of a statute (13).

The rule is that the preamble cannot be made use of to control the enactments themselves when they are expressed in clear and unambiguous terms. The Court has to look to the actual words creating the right, imposing the obligation or conferring the power, as the case may be. If such words are in the enactment, it is to that the Court must look; if in a preamble, to that (14). When a preamble contradicts the enacting portion of a statute and that portion is quite clear, the enactment must prevail (15).

It is not open to the Courts to question the right of the legislature to go beyond what was stated in the preamble as the reason for the legislation, for the legislature may very well have done actually a little more than what it started to do (16).

Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of *vires*, where the legislature concerned has powers to legislate on certain specified matters only. The Court must still see, in such cases, whether the subject matter of the impugned legislation is really within those powers (17).

**10. Construction of a consolidating Act :—**A consolidating Act should be construed, not with reference to the circumstances existing at the time of the preceding Acts, but in relation to those existing at the time of the consolidating Act. The

(10) *Shamshir Ali v. Ratanji* [1952] Hyd. 58 (F.B.). See also the observations of Lord Halsbury, L. C. in *Coms. of Income-Tax v. Pemsel* [1891] 15 App. Cas. 581 at p. 542.

(11) *Anwar Ali v. State of West Bengal* [1952] C. 150 (F.B.). See also *Popatlal v. State of Madras* [1953] S. C. 274.

(12) *Mt. Rajpali v. Suraj* [1936] A. 507 (F.B.) at p. 511. [1936] A.I.J. 659; see also *Arulai v. Antonimuthu* [1945] M. 47; *Mani Lal v. Trustees &c.* [1918] 45 Cal. 343; *Taherali v. Chanabasapa* [1943] B. 226; *Darbar Patiala v. Narain Das* [1944] L. 302.

(13) *Sutton v. Sutton* [1882] 22 Ch. D. 511 at p. 520; *Debi Das v. Maharaj Rup Chand* [1927] A. 593 (596), 49 All. 903, 25 A.I.J. 609, 102 I.C. 792.

(14) *Emp. v. Benoari* [1943] F.C. 36 (71).

(15) *Benwari v. Emp.* [1943] C. 285 (312).

(16) *Pamidi v. Junus* [1936] M. 844 (848), 44 M.L.W. 554.

(17) *Rex v. Basudeva* [1950] F.C. 67, [1950] M.W.N. 257 (2).

first step taken should be to interpret the language of the statute, and an appeal to earlier decisions can only be justified on some special ground (18). Lord Halsbury (Lord Chancellor) observed: "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed" (19). "The question is not what may be supposed to have been intended, but what has been said" (20).

If a consolidation Act re-enacts with a like context a word or phrase in one of the Acts consolidated which has received judicial interpretation, that interpretation will generally be applicable to the same word or phrase in the consolidation Act (21).

**11. Reference to previous legislation** :—The positive enactment in a statute cannot be qualified or neutralized by indications of intention gathered from previous legislations upon the same subject (22). Their Lordships of the Judicial Committee observed: "The respondent maintained this singular proposition that in dealing with a consolidating statute, each enactment must be traced to its original source and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither law nor reason to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed" (23). In a subsequent case (24) their Lordships indicated a modification of this principle in the following words: "It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may be founded, but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended." In a recent case under the Sea Customs Act, 1878 Lord Thankerton who delivered the judgment of the Judicial Committee further observed: "If there were any doubt as to the proper construction of s. 188 of the 1878 Act, it would undoubtedly be legitimate to consider the previous law which it was consolidating and amending" (25).

Reference to the previous state of law is not relevant except where the provision is of doubtful import (26).

**12. Reference to proceedings of the Legislature** :—In construing the meaning of the words used in a section, a reference to the proceedings in the legislature, e.g., statement made on introduction of the measure or its discussion, is not

(18) *Bank of England v. Vagliano* [1891] A.C. 107.

(19) *Ibid* at p. 120.

(20) *Brophy v. Attorney General of Manitoba* [1895] A.C. 202 (P.C.) at p. 216.

(21) *Ramchandra v. Bhalu Patnaik* [1950] Or. 125 (F.B.).

(22) *Administrator General v. Premal* [1895] 22 Cal. 788 (P.C.) at p. 797.

(23) *Ibid* at p. 798.

(24) *Abdur Rahim v. Abu Mahomed* [1928] P.C. 16 (18), 55 Cal. 403, 55 I.A. 96, 32 C.W.N. 621, 47 C.L.J. 150.

(25) *Secretary of State v. Mask & Co.* [1940] P.C. 105 (109), 67 I.A. 222, 44 C.W.N. 109, [1940] Mad. 595, 188 I.C. 231; see also *Emp. v. Benoari* [1943] F.C. 36 (70); *Venkateswara v. Venkatesha* [1941] M. 449 (452).

(26) *Moolji Jaitha & Co. v. Khandesh S. & W. Mills Co.* [1950] F.C. 83.

permissible (27). The practice of referring to the proceedings of the legislature has been disapproved in the following passage: "Their Lordships observed that the learned Judges who constituted the majority in the appellate Court, although they do not base their judgment upon them, refer to the proceedings of the legislature. . . . Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British legislature are under construction, are equally cogent in the case of an Indian statute" (28). Reference to the report of the Select Committee and proceedings in the legislature is not permissible in aid of the interpretation of a statutory provision (29).

A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment aided by such historical material as reports of statutory committees, preambles *etc.* (30).

**13. Reference to reports of Indian Law Commissioners :—**A reference to the reports of the Indian Law Commissioners have, however, been held to be permissible, though reference to proceedings of the Legislative Council, reports of the Select Committee thereof, draft stages of a Bill and statements of objects and reasons are not permissible (31). But see *Madho Singh v. Skinner*, *supra* and *Assam Rys. &c. Co. v. C. I. Ry.* [1935] A.C. 445.

**14. Statement of objects and reasons :—**The statement of objects and reasons appended to the Bill is not part of an Act, and is not to be referred to by the Courts in its interpretation. What the authors of the Bill hoped that the Act might achieve is a different matter (32). But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy (33). The same observations apply to the report of the Select Committee (29).

**15. Decisions passed under previous Acts :—**When a clause in an Act has received a judicial interpretation and is re-enacted in the same terms, the legislature is deemed to have adopted that interpretation (34). In this view the decisions passed under the previous Companies Acts especially under the English Acts of 1862, 1908,

- (27) *Krishna v. Nallaperumal* [1919] 47 I.A. 33, 22 Bom. L.R. 508 (P.C.); *Queen-Empress v. Sri Churn* [1895] 22 Cal. 1017 (F.B.); *Madho Singh v. Skinner* [1942] L. 243 (252).
- (28) *Administrator General v. Premlal* (*supra*) at p. 799.
- (29) *Dinanath v. Sati Prasad* [1922] 27 C.W.N. 115; *Sarat Sundari v. Uma Prasad* [1904] 8 C.W.N. 578; *Queen-Empress v. Tilak* [1897] 22 Bom. 112 (127); *Tamijan-nessa v. Purna Chandra* [1927] C. 821, 47 C.L.J. 66, 103 I.C. 853; see also *Debendra v. Jogendra* [1936] C. 593; *Hiralal v. Parasramsao* [1942] N. 5; *In re "New Sind"* [1942] S. 65 (69); *Mahalakshmi v. Shamrangini* [1941] C. 673; *Hari v. Jamal* [1942] P. 304.
- (30) *Gopalan v. State of Madras* [1950] S.C. 27—per Patanjali Sastri J.; *Aswini Kumar v. Arabinda* [1952] S.C. 369.
- (31) *Woodroffe's Civil Procedure Code*, 2nd ed., p. 7.
- (32) *Parsram v. Tarachand* [1936] S. 209 (210); see also *Punyendra v. Jogendra* [1936] 64 C.L.J. 212 (265); and *Midnapur Zemindary Co. v. Kumar Chandra* [1948] C. 544; *Aswini Kumar v. Arabinda*, *supra*.
- (33) *Ranganathan v. Govt. of Madras* (1955) S.C. 604, (1955) S.C.A. 41, (1955) S.C.J. 575.
- (34) *Exparte Campbell* [1870] 5 Ch. App. 703; *Avery v. Wood* [1891] 3 Ch. 115; *R. v. Abraham* (*infra*).

1949 and 1948 are still valuable so far as the same language has been repeated in the present Act (35). The Court, however, is not bound to adopt a construction erroneously placed on the former Acts (36). But the application of a decision may be excluded by a change in the language of the new Act (37). The Companies Act should be construed fairly and not narrowly (38).

**16. Amending Act—Interpretation :—**In general it may be said that the repeal or amendment of an Act does not affect a right already in existence, unless a contrary intention is made out expressly or by implication (39). "The application of an Act is when the parties begin to move under it" (40).

When a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier Act, then this must thereafter be read and construed in such a way that there may be no need to refer to the amending Act at all (41). In such a case the subsequent repeal of the amending Act does not affect the amendments made by it (42).

**17. Retrospective operation :—**"Unless there be something", said Lord Cranworth, "in the language, context or objects of an Act of Parliament showing contrary intentions, the duty and practice of Courts of Justice is to presume, in conformity with the adage of Lord Coke, that the legislature enacts prospectively and not retrospectively" (43). "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so far as to impair an existing right or obligation otherwise than as regards procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospectively only" (44). It would be most dangerous construction to give a retrospective effect to a statute by implication (45). A statute is not to be construed to have a greater retrospective operation than its language renders necessary (46). "When you are construing an Act which makes changes in the law . . . you will not construe the words, unless they are clearly to that effect, so as to upset vested rights and liabilities which have been complete in themselves" (47).

No doubt, the general principle is that Acts of the legislature are not given retrospective effect, unless the language makes it clear that such was the intention,

(35) See *Mersey Docks case* [1865] 11 H.L.C. 443; see also *Thames Conservators v. Smeed, Dean & Co.* [1897] 2 Q.B. 334 (C.A.); *R. v. Abraham* [1904] 2 K.B. 859.

(36) *Colonial Bank v. Whinney* [1885] 30 Ch. D. 261, 11 App. Cas. 426.

(37) *Thomas v. United Butter Co.* [1909] 2 Ch. 484.

(38) *Government Stock Investment Co.* [1891] 1 Ch. 649 at p. 655.

(39) *Choudhury Gursaran v. Akhouri* [1927] P. 203 (205), 6 Pat. 296, 104 I.C. 580; *Achanta v. Guniseti* [1937] M. 92, 107 I.C. 649.

(40) *Keshoram v. Nundolal* [1927] P.C. 97 (98), 54 I.A. 152, 54 Cal. 508, 31 C.W.N. 646, 46 C.L.J. 341.

(41) *Shamrao v. Perulekar* [1952] S.C. 324.

(42) See s. 6A of the General Clauses Act, 1897.

(43) *Kerr v. Ailsa* [1854] 1 Macq. 736 (737); see also *Salig Ram v. Emp.* [1943] A. 26 (42); *Rashid Bibi v. Tufail Md.* [1941] L. 291.

(44) *Per Wright J. in re Athlumney* [1898] 2 Q.B. at pp. 551-52; see also *Munjhoori v. Akel* [1913] 17 C.L.J. 316; *Budhu v. Hafiz* [1913] 18 C.L.J. 274; *Promotha v. Mohini* [1920] 47 Cal. 1108, 24 C.W.N. 1011; *Gopeshwar v. Jiban* [1914] 41 Cal. 1125; *Javan Mal. v. Mukta Bibi* [1890] 14 Bom. 516; *Thompson v. Iack* [1846] 3 C.B. 540 (551); *In re Parish of Pullborough* [1894] 1 Q.B. 725; *Md. Abdus Samad v. Kurban* [1903] 31 I.A. 30, 29 All. 118, 8 C.W.N. 201.

(45) *Per Pollock, C. B. in Young v. Hughes* [1859] 28 L. J., Ex. 161 (164).

(46) *Lauri v. Renad* [1892] 3 Ch. 421—per Lindley, L. J.; *Munjhoori v. Akel* (supra); *Budhu v. Hafiz* (supra); *Secretary of State v. Bank of India* [1938] P.C. 191, [1938] Bom. 502, 42 C.W.N. 957.

(47) *Clements v. D. Davis & Sons, Ltd.* [1927] A.C. 126, per Lord Dunedin at p. 131.

but in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity, one should not assume that the legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions (48).

But as regards procedure, no person has a vested right in any course of procedure (49). The general principle is that alteration in procedure is always retrospective, unless there be some good reason against it (50). "The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in *Colonial Sugar Refining Co. v. Irving* (51), where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" (52).

Even where a section finds a place in a procedure code, but imposes in essence a serious restriction upon the title of a person, retrospective effect will not be given to its words (53).

**18. Pending action :—**In general when the law is altered during pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights (54). Whether a particular right is substantive or not cannot be judged by whether the legislature can curtail it (55).

**19. Right of appeal :—**So far as the right of appeal is concerned, alteration of a statute does not either give it or take it away. Where a right of appeal to the Privy Council was given by an amending Act, their Lordships of the Judicial Committee held that the amending Act had no retrospective operation: "Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the statute came into force, were final, are provisions which touch existing rights" (56). In *Colonial Sugar Refining Co. v. Irving* (57) their Lordships said: "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to

(48) *Rustomji v. Bai Moti* [1940] B. 90, [1940] Bom. 50, 41 Bom. L.R. 1310 per Beaumont, C.J.

(49) Per Mellish, L. J. in *Costa Rica v. Erlanger* [1876] 3 Ch. D. 69.

(50) Per Lord Blackburn in *Gardner v. Lucas* [1878] 3 App. Cas. 603; see also *Tularam v. Tejimal* [1942] N. 49; *Shreekanth v. Emp.* [1943] B. 169; *Sham Singh v. Vir Bhan* [1942] L. 102; *Banwari v. Emp.* [1943] P. 18.

(51) [1905] A.C. 369 (P.C.), 92 L.T. 738.

(52) *Delhi Cloth & General Mills v. Income Tax Commissioner* [1927] P.C. 242, 54 I.A. 421, 32 C.W.N. 237.

(53) *Promotha v. Mohini* (supra); *Phoenix Bessemer Co.* [1875] 45 L. J., Ch. 11.

(54) *Thistleton v. Frewer* [1861] 31 L. J. Ex. 230; *Young v. Hughes* (supra); *Sheopujan v. Bishnath* [1930] A. 706, 52 All. 886, 128 I.C. 390; *Shiya Janki v. Kirtanand* [1936] P. 173, 160 I.C. 606; *Joseph Suche & Co.* [1876] 1 Ch. D. 48, 38 L.T. 774; see also *Shib Nath v. Porter* [1943] C. 377 (390); *Bireswar v. Indu Bhusan* [1945] C. 573; *Sarma v. Nagendrabala* [1952] C. 879 (F.B.).

(55) *Sarma v. Nagendrabala*, supra.

(56) *Delhi Cloth & General Mills Co. v. Income Tax Commissioner* (supra) [1927] P.C. at p. 244.

(57) [1905] A.C. 369 (P.C.) at pp. 372-73; see also *Sheopujan v. Bisanath* (supra); *Ram Singh v. Sankar Dayal* [1928] A. 437 (F.B.), 50 All. 905, 111 I.C. 6.

a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless "clear intention to that effect is manifested."

**20. General rule of construction** :—In determining either the general object of the legislature or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles would, in all cases of doubtful significance, be presumed to be the true one (58). Words of doubtful import are to be construed in a sense in which they would harmonise with the subject and the object of the enactment (59). If there is ambiguity as to the meaning of a disabling section, e.g., provisions for registration of business names, the construction which is in favour of the freedom of the individual should be given effect to (60). A meaning cannot be attributed to a section based on the reading of a repealed section. The section must be interpreted as it stands on the relevant date (61). Where an Act does not expressly purport to supersede an earlier one, it should be interpreted so as to avoid conflict with the latter if possible (62). "The Court cannot", observed their Lordships of the Judicial Committee, "put into the Act words which are not expressed, and which cannot reasonably be implied on any recognized principles of construction. That would be a work of legislature, not of construction, and outside the province of the Court" (63).

It is elementary that the primary duty of a Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention (64). The primary rule of interpretation is to take the words in their natural, literal or grammatical sense, and if the words are plain and admit but one meaning, seldom any difficulty arises. The language in such cases has got to be taken as decisive of the intention of the legislature and should not be departed from even if it produces in the opinion of the Court any hardship or injustice (65). The Court should give such a construction to the words as would produce harmony and reconciliation (66). No doubt it is the duty of the Court to try to harmonise the various provisions of an Act, but it is not its duty to stretch the words used to fill up gaps or omissions in the provisions of the Act (67).

A statute is never supposed to use words without a meaning. To reject words as insensible is the *ultima ratio* when absurdity would follow from giving effect to the words as they stand (68). When a statute enacts that something shall be deemed to have been done which in fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to, and full effect must be given to the statutory fiction and it should be carried to its logical conclusion (69).

(58) Maxwell on Statutes, 7th ed., p. 166 quoted with approval in *Maikoo Lal v. Santoo* [1936] A. 37 (F.B.), 162 I.C. 954.

(59) *Moolji Jaitha & Co. v. Khandesh S. & W. Mills Co.* [1950] F.C. 83.

(60) *David v. D'Silva* [1934] P.C. 36 (40), 148 I.C. 607.

(61) *Venkata Subamma v. Ramayya* [1932] P.C. 92 (94), 59 I.A. 112, 55 Mad. 443, 36 C.W.N. 441.

(62) *Rangacharya v. Dasacharya* [1913] 37 Bom. 231.

(63) *Kamalaranjan v. Secretary of State* [1938] P.C. 281, 43 C.W.N. 113.

(64) *New Piece Goods Bazar Co. v. Comr. of Income Tax* [1950] S.C. 165; *Moolji Jaitha & Co. v. Khandesh S. & W. Mills Co.* [1950] F.C. 83; *Shamrao v. Parulekar*, [1952] S.C. 324.

(65) *Moolji Jaitha & Co. v. Khandesh S. & W. Mills Co.* (supra).

(66) *Bhuwarka Bros. Ltd. v. Dunichand* [1952] C. 740 (S.B.).

(67) *Hira Devi v. District Board* [1953] S. C. 362.

(68) *Bhailal v. Addl. Dy. Comr.* [1953] Nag. 89 (F.B.).

(69) *State of Bombay v. Pandurang* [1953] S. C. 244.

It is no doubt true that so far as the words and contents fairly and reasonably permit, a Court should avoid a construction which would lead to anomalous and patently unreasonable results, but this must not be allowed to give the language a meaning which it cannot fairly and reasonably bear. Where the legislature uses technical words, it must not be supposed that it has used them in any but their technical sense (70). The object of the legislature must be gathered from the language used and it is not open to the Court to alter or amend that language for making it consistent with what the Court thinks might be the object of the legislature. But when the expression used is capable of both a wide and a limited interpretation, the Court can consider what was the object of the legislature and what was the mischief aimed at, and the Court must try to give that construction which will be more consistent with the suppression of the mischief (71). A Court is not competent to proceed upon the assumption that the legislature has made a mistake. Even if there is some defect in the phraseology used, the Court cannot aid the defective phraseology or add or amend or by construction make up the deficiencies. Even if there is a *casus omissus*, it is for others than the Courts to remedy the defect (72).

It is not a sound principle of construction to brush aside words in a statute as being inappropriate surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute (73). The enacting part of a statute must, where it is clear, be taken to control the *non-obstante* clause where both cannot be read harmoniously; for even apart from such clause, a later law abrogates earlier laws clearly inconsistent with it (74). It is one of the settled rules of construction that to ascertain the legislative intent all the consistent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself (75).

"The construction of the Act," said Lord Brougham so far back as 1846, "must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly, much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it. The true way in these cases is, to take the words as the Legislature have given them and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act" (76). "I think", observed Pollock, C.B., "where the meaning of a statute is clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being

(70) *Mahindar Singh v. King* [1950] 57 Cr. L. J. 1483 (P.C.); *State of Madhya Bharat v. Hiralalji* [1953] M. B. 26.

(71) *Walchandnagar Industries Ltd. v. Ratanchand* [1953] B. 285.

(72) *Nalinakshya v. Sham Sunder* [1953] S.C. 148.

(73) *Aswini Kumar v. Arabinda* [1952] S.C. 369.

(74) *Ibid*, per Patanjali Sastri, C. J., Bose & Ghulam Hasan, JJ.

(75) *Ibid*, per B. K. Mukherjea, J. See also the observations of Lord Halsbury in *Comrs. for Income-tax v. Pemsel* [1891] 15 App. Cas. 531 at p. 542; *Popatlal v. State of Madras* [1953] S.C. 274.

(76) *Crawford v. Spooner* [1846] 4 M.I.A. 179 at p. 187.

framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it and I think to take a different course is to abandon the office of a Judge and to assume the province of legislation" (77).

"The golden rule is", observed Lord Simon, L. C., "that the words of a statute must *prima facie* be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinion of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words, the meaning of which is not entirely plain, there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result" (78).

"One of those presumptions is, that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringing rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law" (79).

In a penal statute the Courts should interpret words of ambiguous meaning in a broad and liberal sense. If there is honest and substantial compliance with an array of puzzling directions, it is enough even if on some hypercritical view of the law other ingenious meanings can be devised (80).

In construing any enactment the verbal construction of a particular section, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any doubt or difficulty in the wording of the particular section an enquiry is permissible into the history of the enactment and any supposed defect in the former legislation on the subject which it wanted to cure (81).

It is a settled canon of construction that the interpreter should place himself, as far as possible, in the position of those whose words he is interpreting, and the

(77) *Miller v. Solomons* [1852] 21 L.J. (Q.B.) 161 at p. 197.

(78) *Nokes v. Doncaster Amalgamated Collieries* [1940] A.C. 1014 at p. 1022; see also *Shri Nath v. Puran Mal* [1942] A. 19; *Satyanarayanamurthi v. Papayya* [1914] M. 713 (718); *Lutfar v. Waliar* [1943] C. 59.

(79) *Maxwell on Statutes*, 8th ed., p. 73 quoted with approval by Lord Atkin in *Nokes v. Doncaster Amalgamated Collieries*, *supra* at pp. 1031-1032.

(80) *Seksaria Cotton Mills v. State of Bombay* [1953] S.C. 278.

(81) *Jamuna Prosad v. Motilal* [1950] C. 63, 54 C.W.N. 182 relying on *Queen v. Bishop of London* [1889] 24 Q.B.D. 213 at pp. 224, 225.



meaning of certain words and terms used in an ancient document or a statute can be properly explained only by reference to the circumstances existing at the time when the statute was enacted or the document was written (82).

No words employed by the legislature in any enactment should be treated as redundant, but meaning and effect should be given to all the words employed (83).

The omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. In such cases the cross-references have to be implied in order to remove the inconsistency (84).

"Decisions under other statutes", observe their Lordships of the Judicial Committee, "have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another" (85). But where it is gathered from a later Act that the legislature attached a particular meaning to certain words in an earlier cognate one, it would be taken to be legislative declaration of its meaning there (86).

If a new enactment is such that certain new rights unknown previously to law are created by the new statute and certain remedies are provided for the infringement of such rights, it must logically follow that it was the clear intention of the legislature that such remedies should be enforced only in the manner and by following the procedure indicated. But the Indian Companies Act must be regarded as an Act merely legislating for or regulating certain rights recognized under the Common Law of England (87).

The Legislature is deemed to have used a particular word in an enactment in one and the same sense, unless the contrary intention appears from the context (88).

**21. Reference to English decisions:**—Company legislation in India has followed on the lines of legislation in England, and Courts in India are bound to follow the principles laid down in English Courts with regard to the same matter (89). In considering the construction of a section in an Indian Act which is professedly based on an English enactment and which it reproduces, almost word for word, the language of the English enactment, and which relates to a branch of the law which is entirely English law, the Courts of India are in practice, if not in theory, bound by the decisions of the English Court of Appeal (90). Where the words in an Indian Act are the same as in an English Act, the English decisions can be referred to as a guide in construing the Indian Act (91).

Where the language of the sections of the English and the Indian Acts is identical, Indian Courts would very much hesitate to depart from the view

(82) *Auckland Jute Co. v. Tulsi Chandra* [1949] Fed. 153, [1949] F.I.J. 255. [1949] F.C.R. 201.

(83) *Sat Pal v. Abdul Hayi* [1949] E.P. 1.

(84) *Ram Kissen Das v. Satya Charan* [1950] P.C. 81.

(85) *Nippon Yusen Kaisha v. Ramjiban* [1938] P.C. 152, [1938] 2 Cal. 381, 42 C.W.N. 677, 65 I.A. 263.

(86) *Hari Charan v. Ulipur Bank* [1942] C. 442 46 C.W.N. 634, 75 C.I.J. 203, 201 I.C. 674.

(87) *Mohedeen v. Tinnevely Mills Co.* [1928] M. 571, [1928] M.W.N. 442, 111 I.C. 225.

(88) *Shri Nath v. Puran Mal* [1942] A. 19 (22).

(89) *Nareesh Chandra v. Ramani Kanta* [1945] 49 C.W.N. 593.

(90) *Lovelock & Lewes v. Malabar T. & S. Mills* [1915] 13 M.L.T. 282, 18 I.C. 997. See also *Piara Singh v. Peshwar Bank* [1915] 28 I.C. 53; *Sm. Bhagwati v. New Bank of India* [1950] E.P. 111 (F.B.) per Harnam Singh, J. See also *Suresh Chandra v. Bank of Calcutta* [1950] 54 C.W.N. 834 (Harris, C.J. and Banerjee, J.).

(91) *Ganesh v. Harihar* [1904] 31 I.A. 116 (120); *Nizam Khan v. Hukum Chand* [1941] L. 316 (320).

expressed by eminent Judges in England who have had great experience of company law, unless there is something internal in the section itself which would justify its interpretation in a different way (92). But because a section of an Indian Act is copied from an English Act, it should not be interpreted contrary to the statute law of India as contained in another Act, *e.g.*, the Provincial Insolvency Act (93). Now that the Indian legislature is gradually evolving an independent system of its own, even in respect of the company law, as is evidenced by the Companies (Amendment) Act, 1936, and the present Act, the following caution of their Lordships of the Judicial Committee should be borne in mind in interpreting the company law: "It has often been pointed out by this Board that where there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may have been founded" (94).

**22. Foreign Decisions** :—Canadian, Australian and American decisions were not binding on the Federal Court of India, but such decisions, if relevant, would always be listened to in the Federal Court with attention and respect (95). They will however be treated with great caution even where the words and expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly (96).

## PART I

### PRELIMINARY

**1. Short title, commencement and extent.**—(1) This Act may be called the Companies Act, 1956.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(3) It extends to the whole of India except the State of Jammu and Kashmir.

**23. Headings**:—Headings prefixed to sections are considered as preambles to those sections. They constitute an important part of the Act itself and afford a better key to the construction of sections which follow them than preambles to the Act (97). But the general words in the heading of a group of sections cannot be construed as limiting the effect of plain words in a section contained in that group (98).

(92) *Alliance Bank of Simla v. Feroz Shah* [1936] Pesh. 57, 160 I.C. 908.

(93) *Shiam Lal v. U. P. Oil Mills* [1933] A. 789, [1933] A.L.J. 1203 (F.B.).

(94) *Ramanandi v. Kalawati* [1928] P.C. 2 (4), 55 I.A. 18, 7 Pat 221, 32 C.W.N. 402; see also *Shamshir Ali v. Ratanji* [1952] Hyd. 58 (F.B.).

(95) *Madras Province v. Boddu* [1942] F.C. 33.

(96) *In re C. P. & Berar S. M. S. & L. Taxation Act* [1939] F.C. 1; *Roshan Lal v. Emp.* [1946] A. 161 (168); *Tan Bug v. Collector* [1946] B. 216.

(97) *Eastern Counties & Ry. Co. v. Matriage* [1860] 9 H.L.C. 32 at p. 41; *Dwarkanath v. Tafazzur* [1917] 44 Cal. 267, per Woodroffe, J.

(98) *Fletcher v. Birkenhead Corporation* [1907] 1 K.B. 205.

"These various headings," observed Baron Channell, "are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain the enactments, but as affording, as it appears to me, a better key to the constructions of the sections which follow them than might be afforded by a mere preamble" (99).

"It is now settled law that headings prefixed to the bill passed by the legislature have the force of words used in the preamble of an act and may be used as 'a key to open the minds of the makers of the Act,' and in this respect are unlike marginal headings which have no force for the purpose of interpretation"(1). A heading to a group of sections cannot, however, be pressed into a constructive limitation upon the exercise of powers given by the express words of the Act (2).

**24. Marginal notes:**—Marginal notes are no part of the sections (3). They are merely abstracts of the clauses intended to catch the eye and to make the task of reference easier and more expeditious (4). In *Balraj v. Jagat Pal* (5) their Lordships of the Judicial Committee laid down the law in the following words: "It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act." The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament (5).

In a recent Full Bench case in Oudh it has been held that "the side-note although it forms no part of the section is of some assistance, inasmuch as it shows the drift of the section" (6). But the Supreme Court has re-affirmed the principle enunciated, in Note (5), *supra* and has held that in an Indian statute as in an Act of Parliament of the United Kingdom, the marginal notes cannot be referred to for the purposes of construing the statute, nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment (7).

**25. Proviso:**—The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main

(99) *Eastern Counties & C. Ry. Co. v. Marriage* [1860] 9 H.L.C. 32 at p. 41.

(1) *Debi Das v. Mahataj Rup Chand* [1927] A. 593 (596), 19 All. 903, 25 A.L.J. 609, 102 I.C. 792; *Baldeo v. Kashi* [1926] A. 312 (316), 24 A.L.J. 337, 92 I.C. 995 [in this case: "It is at least open to question whether the words themselves have any operative effect"]; *Narayanawami v. Rangaswami* [1926] M. 749 (751), 49 Mad. 716, 95 I.C. 731; but see *Chuni Lal v. Sheo Charan* [1925] A. 787 (789), 47 All. 756 where Sulaiman & Boys JJ. held that the headings were to be ignored; no authority however was cited for this.

(2) *Abdul v. Municipal Commissioners* [1918] 42 Bom. 162 (172).

(3) *Sushil v. Emp.* [1943] C. 489 (491). *Ratanji* [1911] B. 397 (402); *Shri Nath v. Purnan Mal* [1942] A. 19 (34).

(4) *Sutton v. Sutton* [1882] 22 Ch. D. 511; *Punardeo v. Ramsarup* [1898] 25 Cal. 838; *Dukhi v. Halway* [1896] 23 Cal. 55. See also *Claydon v. Green* [1868] 3 C.P. 511.

(5) [1908] 26 All. 393 (406), 31 I.A. 132, 8 C.W.N. 699 followed in *Kesava Chetty v. Secretary of State* [1918] 42 Mad. 451; see also *D'Souza v. Reserve Bank* [1936] B. 510.

(6) *Ramchandria v. Bhalu Patnaik* [1950] O. 125 (F.B.). See also *Iswari Prasad v. N. R. Sen* [1952] C. 273 (S.B.).

(7) *Comr. of Income Tax v. Ahmedbhai Umarbhai & Co.* [1950] S.C. 134—per Patanjali Sastri J. See also *Suresh Chandra v. Bank of Calcutta* [1950] 54 C.W.N. 832; *Mothar Mal v. State* [1953] A. 524, [1953] A.L.J. 243; *Nalinakshya v. Shyam Sunder* [1953] S.C. 148.

enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment (8).

The normal rule of construction in the case of a proviso is that it governs what goes before it and does not affect what follows after it (9). But "if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso" (10).

**26. Explanation:**—It may be that an *explanation* in an Act cannot be decisive of the true meaning of its provision which depends on the words used therein, but when two interpretations are sought to be put upon a provision, that which fits the *explanation* is to be adopted, provided it is consistent with the language employed, in preference to the one which attributes to the provision a different effect (*exception*) from what it should have according to its description by the legislature (11).

**27. Illustration:**—An illustration cannot have the effect of modifying the language of the section which alone forms the enactment (12). It should not be read as restricting the operation of the section, especially so when the effect would be to curtail a right which the plain words of the section would confer (13).

**28. Punctuation:**—"Then Lordships think," observed the Judicial Committee, "that it is an error to rely on punctuation in construing Acts of the legislature" (14). "The soundness of this principle", said Strachey, C. J., "is well illustrated in the present instance by the fact that in the original edition of the Indian Divorce Act there is not a colon at the end of the fourth paragraph of S. 17, but a full stop" (15). Scott, C. J., in the undermentioned case (16), distinguished the above decision (14) on the ground that an old Regulation of Bengal was under the consideration of the Judicial Committee in the above Privy Council decision (14) and that their Lordships' opinion was not applicable to Acts of the regular legislatures since established. The decision of Scott, C. J., however, appears to be wrong as the Privy Council have recently re-iterated their opinion that a Court of law is bound to read a section without the commas inserted in the print (17). "To my mind however", observed Lord Esher, M. R., "it is perfectly clear that in an Act of Parliament there are no such things as stops" (18).

**28A. Sub-s. (2). Commencement:**—The Act came into force on 1st April, 1956 *vide* Gazette of India Extraordinary dated 8th March, 1956 Part II sec. 3.

**29. Extent:**—The previous Companies Act applied to the whole of British India. It did not, of its own force, apply to a Native State (19).

- (8) *M. & S. M. Ry. v. Bezwada Municipality* [1941] P.C. 71. See also *Lakshmi v. Official Assignee* [1950] M. 410 (F.B.), 63 M.L.W. 115, [1950] 1 M.L.J. 123.
- (9) *Maung Thien* [1940] R. 280; see also *Ram v. Gouri* [1923] 53 Cal. 492.
- (10) *Governor-General v. Municipal Council* [1949] P.C. 39 (42), 1938 A.L.J. 462, 75 I.A. 213, 53 C.W.N. 294, [1949] Mad. 529, 51 Bom. L.R. 927.
- (11) *State of Bombay v. United Motors (India) Ltd.* [1953] S.C. 252.
- (12) *B. N. Ry. Co. v. Rattanji* [1938] P.C. 67; *Anirudha v. Administrator General* [1949] P.C. 244, 53 C.W.N. 667, 76 I.A. 104. But see *contra* *Muralidhar v. International Film Co.* [1943] P.C. 34 (38); *Junma Masjid v. Devaiah* [1953] M. 637 (F.B.).
- (13) *Anirudha v. Administrator General*, *supra*. on appeal from [1946] C. 396.
- (14) *Maharani of Burdwan v. Krishna Kumari* [1886] 14 Cal. 365 (372) (P.C.).
- (15) *Caston v. Caston* [1899] 22 All. 270 (276-77).
- (16) *Taylor v. Bleach* [1914] 39 Bom. 182 (190); see also *Secretary of State v. Ruj-luckee* [1887] 25 Cal. 239 (242) and *A (wife) v. B (husband)* [1898] 23 Bom. 460.
- (17) *Pugh v. Ashutosh* [1929] P.C. 69 (71), 8 Pat. 516, 56 I.A. 93, 38 C.W.N. 323.
- (18) *Devonshire v. O'Connor* [1890] 24 Q.B.D. 468 at p. 478.
- (19) *Appa Dada v. Ramkrishna* [1930] B. 5, 53 Bom. 652, 31 Bom. L.R. 1187.

After the partition of India the Act no longer extended outside India. See Notes 32 and 33 *infra*.

**30. "British India":**—"British India" was defined in cl. (7) of s. 3 of the General Clauses Act X of 1897, as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, as follows: "'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor General of India or through any Governor or officer subordinate to the Governor General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian Law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar." With effect from 15th August, 1947 this definition has been amended by inserting after "any period after that date" the following words, namely, "and before the date of the establishment of the Dominion of India (Federation of Pakistan—in Pakistan)"—See *the India (Adaptation of Indian Laws) Order, 1947* and *the Pakistan (Adaptation of Pakistan Laws) Order, 1947*. For the present definition of "British India" see N. 34, and cl. (5) of s. 3 of the General Clauses Act X of 1897 as amended in India by the *Adaptation of Laws Order, 1950*.

**31. India & Pakistan:**—As from 15th August, 1947 in place of British India two independent Dominions were set up known as India and Pakistan. The territories of India are the territories which were included, before 15th August, 1947, in British India except the territories allotted to Pakistan, namely, (a) East Bengal and West Punjab (as demarcated by the Radcliffe award), (b) the Province of Sind and the Chief Commissioner's Province of British Baluchistan, and (c) the North-West Frontier Province. The Indian States might accede to either of the Dominions—See ss. 1 to 4 of the *Indian Independence Act (10 & 11 Geo. 6, Ch. 30)*. In place of the definition of "India" in clause 27 of s. 3 of the General Clauses Act, 1897 the following new definition was inserted by the *Indian (Adaptation of Existing Indian Laws) Order, 1947*. "(27) 'India' shall mean—(a) as respects any period before the establishment of the Dominion of India, British India together with all territories of any Indian ruler then under the suzerainty of His Majesty, all territories under the suzerainty of such Indian ruler, and tribal areas; and (b) as respects any period after the establishment of the Dominion of India, all territories for the time being included in that Dominion." [In Pakistan in the above definition of India in cl. (a) for "Dominion of India" read "Federation of Pakistan" and in cl. (b) for "Dominion of India" read "Federation of Pakistan," and for "that Dominion," read "the Dominion of India"—See *the [Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947]*. In India to the above definition of 'India' the following was added by the *Adaptation of Laws Order, 1950*, namely:—"(c) as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."

**32. Applicability of Companies Act in India and Pakistan:**—The Indian Companies Act, 1913, as other similar Acts, continued as the law of both the Dominion of India and the Dominion of Pakistan even after the 15th of August, 1947 until other provision was made by the laws of the Legislature of any of the aforesaid Dominions or by any other Legislature or other authority having power in that behalf. *Vide* the Indian Independence Act, 1947 (10 & 11 Geo. 6, Ch. 30), s. 18, sub-s. (3) which ran as follows: "(3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day (15th August, 1947) [see sub-s. (2) of s. 1 of Indian

*Independence Act, 1947*] shall so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf." The effect of s. 5 of the High Courts (Bengal) Order, 1947 and the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 is "that whereas before the 15th August, 1947, there was one Act entitled 'The Indian Companies Act' which was legally operative throughout the continued territories of India as it existed up to 14th August, 1947, since the 15th August, 1947 for practical purposes the company law governing the administration of companies in Pakistan on the one hand and in the Union of India on the other, may be taken to be the same as if the law as previously contained in the Indian Companies Act had been passed by a central legislature in each of those two new countries in the form of two separate Acts entitled as to the one 'The Pakistan Companies Act' and entitled as to the other 'The Companies Act of the Union of India' " (20).

**33. India:**—The present Act applies to the whole of India except the State of Jammu and Kashmir. The word "India" has been defined in cl. (28) of s. 3 of the General Clauses Act, 1897 (as amended by the Adaptation of Laws Order, 1950) as follows:—" 'India' shall mean,—

- (a) as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;
- (b) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and
- (c) as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."

The expression "**British India**" which occurred in s. 1 of the previous Act has been defined by the aforesaid Adaptation of Laws Order, 1950 amending the General Clauses Act, 1897 as follows:—

**34. "(5) 'British India'** shall mean, as respects the period before commencement of Part III of the Government of India Act all the territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor General of India or through any Governor or officer subordinate to the Governor General of India, and as respects any period after that date and before the date of the establishment of the Dominion of India means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(1) "alter" and "alteration" shall include the making of additions and omissions;

(2) "articles" means the articles of association of a company as originally framed or as altered from time to time in

(20) *Girish Bank Ltd.* [1948] 52 C.W.N. 882—per Ormond J. in the Dacca High Court,

pursuance of any previous companies law or of this Act, including, so far as they apply to the company, the regulations contained, as the case may be, in Table B in the Schedule annexed to Act No. XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882 (VI of 1882), or in Table A in the First Schedule annexed to the Indian Companies Act, 1913 (VII of 1913), or in Table A in Schedule I annexed to this Act ;

(3) “associate”, in relation to a managing agent, means any of the following, and no others :—

(a) where the managing agent is an individual :

any partner or relative of such individual ; any firm in which such individual, partner or relative is a partner ; any private company of which such individual or any such partner, relative or firm is the managing agent or secretaries and treasurers or a director or the manager and ; any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, such individual, partner or partners, relative or relatives, firm or firms ; and private company or companies ;

(b) where the managing agent is a firm :

any member of such firm, any partner or relative of any such member, and any other firm in which any such member, partner or relative is a partner ; any private company of which the firm first-mentioned, or any such member, partner, relative or other firm is the managing

agent, or secretaries and treasurers, or a director, or the manager ; and any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the firm first-mentioned, any such member or members, partner or partners, relative or relatives, other firm or firms and private company or companies ;

(c) where the managing agent is a body corporate :

(i) any subsidiary or holding company of such body corporate ; the managing agent or secretaries and treasurers, or a director, the manager or an officer of the body corporate or of any subsidiary or holding company thereof ; any partner or relative of any such director or manager ; any firm in which such director, manager, partner or relative, is a partner ; and

(ii) any other body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the body corporate and the companies and other persons specified in paragraph (i) above ; and

(d) where the managing agent is a private



company or a body corporate having not more than fifty members :

in addition to the persons mentioned in sub-clause (c), any member of the private company or body corporate ;

*Explanation.*—If one person is an associate in relation to another within the meaning of this clause, the latter shall also be deemed to be an associate in relation to the former within its meaning ;

(4) “associate”, in relation to any secretaries and treasurers, means any of the following, and no others :—

(a) where the secretaries and treasurers are a firm :

any member of such firm, any partner or relative of any such member, and any other firm in which any such member, partner or relative is a partner ; any private company of which the firm first-mentioned, or any such member, partner, relative or other firm is the managing agent, or secretaries and treasurers, or a director, or the manager ; and any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the firm first-mentioned, any such member or members, partner or partners, relative or relatives ; other firm or firms, and private company or companies ;

(b) where the secretaries and treasurers are a body corporate :

(i) any subsidiary or holding company of such body corporate ;

the managing agent or secretaries and treasurers, or a director, the manager or an officer of the body corporate or of any subsidiary or holding company thereof any partner or relative of any such director or manager; any firm in which such director or manager, partner or relative, is a partner; and

(ii) any other body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the body corporate and the companies and other persons specified in paragraph (i) above; and

(c) where the secretaries and treasurers are a private company or a body corporate having not more than fifty members :

in addition to the persons mentioned in sub-clause (b), any member of the private company or body corporate ;

*Explanation.*—If one person is an associate in relation to another within the meaning of this clause, the latter shall also be deemed to be an associate in relation to the former within its meaning ;

(5) “banking company” has the same meaning as in the Banking Companies Act, 1949 (X of 1949) ;

(6) “Board of directors” or “Board”, in relation to a company, means the Board of directors of the company ;

(7) “body corporate” or “corporation” includes a company incorporated outside India but does not include a corporation sole ;

(8) “book and paper” and “book or paper” include accounts, deeds, writings, and documents ;

(9) "branch office" means any establishment described as a branch by the company, not being an establishment specified in an order passed by the Central Government in pursuance of section 8 ;

(10) "company" means a company as defined in section 3 ;

(11) "the Court" means, with respect to any matter relating to a company, the Court having jurisdiction under this Act with respect to that matter in relation to that company, as provided in section 10 ;

(12) "debenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not ;

(13) "director" includes any person occupying the position of director, by whatever name called ;

(14) "District Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction ;

(15) "document" includes summons, notice, requisition order, other legal process, and registers whether issued, sent or kept in pursuance of this or any other Act, or otherwise ;

(16) "existing company" means an existing company as defined in section 3 ;

(17) "financial year" means, in relation to any body corporate, the period in respect of which any profit and loss account of the body corporate laid before it in annual general meeting is made up, whether that period is a year or not :

Provided that, in relation to an insurance company, "financial year" shall mean the calendar year referred to in sub-section (1) of section 11 of the Insurance Act, 1938 (IV of 1938) ;

(18) "Government company" means a Government company within the meaning of section 617 ;

(19) "holding company" means a holding company within the meaning of section 4 ;

(20) "India" means the territory of India excluding the State of Jammu and Kashmir ;

(21) "insurance company" means a company which carries on the business of insurance either solely or in conjunction with any other business or businesses ;

(22) "issued generally" means in relation to a prospectus, issued to persons irrespective of their being existing members

or debenture holders of the body corporate to which the prospectus relates ;

(23) "limited company" means a company limited by shares or by guarantee ;

(24) "manager" means an individual (not being the managing agent ) who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not ;

(25) "managing agent" means any individual, firm or body corporate entitled, subject to the provisions of this Act, to the management of the whole, or substantially the whole, of the affairs of a company by virtue of an agreement with the company, or by virtue of its memorandum or articles of association, and includes any individual, firm or body corporate occupying the position of a managing agent, by whatever name called ;

(26) "managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or by virtue of its memorandum or articles of association, is entrusted with any powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called ;

(27) "member", in relation to a company, does not include a bearer of a share-warrant of the company issued in pursuance of section 114 ;

(28) "memorandum" means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act ;

(29) "modify" and "modification" shall include the making of additions and omissions ;

(30) "officer" includes any director, managing agent, secretaries and treasurers, manager or secretary ; where the managing agent or the secretaries and treasurers are a firm, also includes any partner in the firm ; and where the managing agent or the secretaries and treasurers are a body corporate, also includes any director, managing agent, secretaries and treasurers or manager of the body corporate ; but, save in sections 477,

478, 539, 543, 545, 621, 625 and 633 does not include an auditor ;

(31) "officer who is in default", in relation to any provision referred to in section 5, has the meaning specified in that section ;

(32) "paid-up capital" or "capital paid up" includes capital credited as paid up ;

(33) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies except sub-section (3) of section 550, prescribed by rules made by the Supreme Court in consultation with High Courts, and as respects the other provisions of this Act including sub-section (3) of section 550, prescribed by rules made by the Central Government;

(34) "previous companies law" means any of the laws specified in clause (ii) of sub-section (1) of section 3 ;

(35) "private company" means a private company as defined in section 3 ;

(36) "prospectus" means any prospectus, notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate ;

(37) "public company" means a public company as defined in section 3 ;

(38) "public holiday" means a public holiday within the meaning of the Negotiable Instruments Act, 1881 (XXVI of 1881) :

Provided that no day declared by the Central Government to be a public holiday shall be deemed to be such a holiday, in relation to any meeting, unless the declaration was notified before the issue of the notice convening such meeting ;

(39) "recognised stock exchange" means, in relation to any provision of this Act in which it occurs, a stock exchange, whether in or outside India, which is notified by the Central Government in the Official Gazette as a recognised stock exchange for the purposes of that provision ;

(40) "Registrar" means a Registrar, an Additional, a Joint, a Deputy or an Assistant Registrar having the duty of registering companies under this Act ;

(41) "relative" means, with reference to any person, any one who is related to such person in any of the ways specified in section 6, and no others ;

(42) "Schedule" means a Schedule annexed to this Act;

(43) "Scheduled Bank" has the same meaning as in the Reserve Bank of India Act, 1934 (II of 1934);

(44) "secretaries and treasurers" means any firm or body corporate (not being the managing agent) which, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of a company; and includes any firm or body corporate occupying the position of secretaries and treasurers, by whatever name called, and whether under a contract of service or not ;

(45) "secretary" means the person, if any, who is appointed to perform the duties which may be performed by a secretary under this Act;

(46) "share" means share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied;

(47) "subsidiary company" or "subsidiary" means a subsidiary company within the meaning of section 4;

(48) "total voting power", in regard to any matter relating to a body corporate, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of such body, if all the members thereof and all other persons, if any, having a right to vote on that matter are present at the meeting, and cast their votes;

(49) "trading corporation" means a trading corporation within the meaning of entries 43 and 44 in List I in the Seventh Schedule to the Constitution;

(50) "variation" shall include abrogation; and "vary" shall include abrogate.

**35. Effect of interpretation clause :—**Where a term has been defined in a statute, it must be given that meaning throughout the statute, unless some provision makes it clear that for certain purpose the term must be given another meaning (21). The word "include" in the interpretation clause is intended to be enumerative and not exhaustive. It has an extending force and does not limit the meaning of the term to the substance of the definition. When it is intended to exhaust the signification of the word interpreted, the word "means" is used (22).

"In coming to a determination", observed their Lordships of the Privy Council, "as to the meaning of a particular word in a particular Act of Parliament it is permissible to" consider two points, *viz.*, (i) the external evidence derived from

(21) *Parshottam v. Official Liquidator* [1938] A. 613. [1938] All. 957. See also *National Savings Bank Assn.* [1866] 1 Ch. App. 547; *Anglsea Colliery Co.* [1866] 1 Ch. App. 555; *Imperial Oil & Co. v. Ramchand* [1916] 36 I.C. 980.  
(22) *Strauss & Co.* [1937] B. 15, 38 Bom. L.R. 1080

extraneous circumstances such as previous legislation and decided cases ; (ii) internal evidence derived from the Act itself. . . . . As was said by the Lord Chancellor in *Brophy v. A. G. of Manitoba* (23), the question is not what may be supposed to have been intended but what has been said" (24).

"It is a sound rule of construction", said Cleasby, B., "to give the same meaning to the same words occurring in different parts of an Act of Parliament" (25). "We disclaim altogether", observed Lord Denman, "the assumption of any right to assign different meanings to the same words in an Act of Parliament on the ground of a supposed general intention" (26).

**35A. (1) "Alter" and "alteration":**—These definitions have been inserted by the Joint Committee.

**36. (2) "Articles":**—In this clause after the words "as altered" the words "from time to time in pursuance of any previous companies law or of this Act" are new, for the articles of a company may be altered by the Court. See s. 404 of the present Act. The alteration in the last few words are purely consequential.

As to the articles of association generally, see ss. 33, 34 and 36 and notes thereto. As to the alteration of the articles, see ss. 31 and 38 and notes to those sections.

**37. (3) "Associate" in relation to a managing agent :**—This definition is new and is largely based on the recommendations of the Company Law Committee (para 28). As pointed out by the Committee, if the provisions of the Act regarding the managing agent are to be effectively enforced, they have to be extended to associates of the managing agent. Otherwise they will be easily evaded.

The definition has been altered by the Joint Committee with the following observation: "The scope of the definition has been widened. In particular it has been made applicable to relatives of the person concerned or where the person concerned is a firm, to the relatives of members of the firm. An explanation has been added to make it clear that if A is an associate of B, B is also to be regarded as an associate of A." (*Vide J. C. R. para 10*). For definition of "relative", see cl. (41) of this section. In this clause extensive amendments have been made by the Lok Sabha to rope in the relatives of individuals, partners, directors, managers etc., and the expression "one-half" has been replaced by "one third."

This definition is not in the English Act of 1948.

**37A (4) "Associate" in relation to any secretaries and treasurers :**—This definition has been added by the Joint Committee with the following observation: "In clauses 378 to 383 newly added by the Committee for the reasons explained in paragraph 141 of this report, the appointment, remuneration and conditions of service of 'Secretaries and Treasurers' have been provided for; and all provisions which apply to the managing agents and those associated with them must be made applicable *mutatis mutandis* to the Secretaries and Treasurers and those associated with them also. A separate definition of "associate" in relation to Secretaries and Treasurers, closely modelled on that of the definition of associate of managing agent has therefore been added in sub-clause (4)" (*vide J. C. R., para 10*). See also notes to s. 378 *post*.

In this clause too amendments have been made by the Lok Sabha to rope in the relatives of individuals, partners, directors, managers etc. For definition of "relative", see cl. (41) of this section.

(23) [1895] A.C. 202 (216).

(24) *Edwards v. A. G. of Canada* [1930] P.C. 120 (126), 58 M.L.J. 300

(25) *Courtauld v. Legh* [1869] L.R. Ex. 126 (128).

(26) *R. v. Poor Law Commissioners* [1838] 6 A. & E. 56 (68): see also *Srepati v. Kailash* [1936] C. 331; *Anandji v. Ram Sarup* [1936] A. 495 (F.B.), [1936] A.L.J. 605.

**38. (5) "Banking company" :—**This definition is new. S. 5 (1) (b) of the Banking Companies Act X of 1949 provides: " 'Banking' means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise." Cl. (c) thereof says "banking company" means any company which transacts the business of banking in any State of India."

S. 6 of the aforesaid Act provides, "(1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:—

(a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent of a company;

(c) contracting for public and private loans and negotiating and issuing the same;

(d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any public, general or useful object;

(k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;



(m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section ;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company ;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).

"Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking"—*Explanations to s. 5 of the Banking Companies Act, 1949.*

**38A. (6) "Board of directors" or "Board":**—This definition has been inserted by the Joint Committee [*vide* J. C. R., para 10 (4)]. See sub-s. (3) of s. 252, *post*.

**39. (7) "Body corporate or corporation":**—These definitions are new and are based on sub-s. (3) of s. 455 of the English Act of 1948.

**40. Corporation sole :**—It is by virtue of the Sovereign's prerogative exercised by a Charter or of an Act of Parliament or of prescription that the artificial personage called a corporation, whether sole or aggregate civil ecclesiastical, is created (27). A corporation sole, as distinguished from a corporation aggregate consists of one member only. In form it is essentially different from a corporation aggregate (28). Hindu Law recognizes corporation sole especially, as centres of religions endowments. A Hindu deity as a corporation sole is distinguished from other corporations sole by the fact that it is a juridical person with limited legal capacity (28). In England the Crown is a corporation sole and for certain purposes the Post Master General, certain Ministers of State and the Treasury Solicitor have been created corporations sole (29). Similarly the Public Trustee is a corporation sole (29).

**41. (8) "Book and paper" and "Book or Paper" :**—These definitions are new. They are based on s. 455 (1) of the English Act of 1948—*Notes on Clauses.*

**42. (9) "Branch office" :**—This definition is new. The C. L. C. R. says: "We suggest a definition of 'branch office' which would differ according to the nature of the company. In the case of a banking or insurance company, a branch would mean an establishment described as a branch by the company. In other cases, a branch office would mean an establishment where the same or substantially the same activity as that undertaken in the head office is carried on, and would not include the producing or manufacturing centres or places where they are situated at places other than the registered office of the company. We have thought it fit to give this definition because of the tendency noticed in some concerns treating even manufacturing centres as branches and because of the practical difficulty in determining as to what exactly a 'branch' means. Cases of manufacturing centres within a radius of say, 50 miles of the registered office were cited. It would be a curious process to treat these manufacturing centres having the entire activity as branches so that particularly no check would be exercised and only branch returns would be forthcoming."

(27) Wharton's Law Lexicon, page 262.

(28) Bagchi's Tagore Law Lecture "Law of Corporation," page 313.

(29) Hals. (Hailsh.), Vol. VIII, p. 8.

The definition suggested in the C. L. C. Report has been recast to express the intention in clear terms.—*Notes on Clauses*.

The definition has, however, been further recast by the Joint Committee (*vide* J. C. R., para 10).

**47. (10) "Company":**—The expressions "company", "existing company", "private company" and "public company" have all been defined in s. 3. See notes to that section.

**47A (11) "The Court":**—See s. 10 *post* and notes thereto.

**48. (12) "Debenture":**—The definition of "debenture" in the previous Act has been amplified on the lines of that of s. 455 (1) of the English Act of 1948 on the ground that ordinarily a debenture constitutes a charge on the undertaking of the company or some parts of its property, but there may be debentures without any such charge, and under the law it is not necessary that the debentures should create a charge—*Vide para 27, C. L. C. Report*.

A debenture means a document which either creates or acknowledges a debt (30). It is usually associated with a corporation of some kind. Debentures are usually bonds issued by a company for sums of Rs. 10 or Rs. 100 or their multiples and are offered to the public by means of a prospectus in the same manner as shares.

The term "debenture", though usually applies to instruments issued by companies, is not confined to companies, *e.g.*, clubs have issued debentures and even individuals have done so. It is, as a general rule, one of a series, but a single debenture is not uncommon. In the case of a company a debenture is usually under seal, but there are debentures signed by some of the directors on behalf of the company; and club debentures are commonly under hand only. A debenture generally provides for the payment of a specific principal sum at a specified date; but there are permanent and perpetual debentures also, or debentures payable on a contingency, *e.g.*, in the event of a winding up, or of notice by the company of its intention to pay off the amount secured. A debenture usually provides for the payment of interest at a specified rate, but there are debentures without interest or with interest varying with profits, or subject to conditions. A debenture generally contains a charge on the undertaking of the company or some part of its property, but there are debentures without any charge, and it is not necessary that debentures should create a charge. Debentures are constantly secured by trust deed vesting property in trustees upon trust, if the company makes default, to sell and pay off the debentures, but vast sums have been lent on debentures not so secured. See *Palmer's Company Precedents*, 15th ed. (1938), Part III, pp. 2-3.

As a general rule the term "debenture" is not applied to an instrument unless it purports to be so, but this is not invariably the rule (31).

Debentures may be for a fixed term of years or repayable on notice, or irredeemable (32). They can be framed as payable to bearer. The custom to treat debentures to bearer as negotiable by delivery is recognized to take effect under the law merchant (33), and the Court will take judicial notice thereof (34).

Debentures may be lawfully issued at a discount, where there is a power to borrow money (35), but a scheme under which debentures so issued give to the holders

(30) *Levy v. Abercorries State Co.* [1887] 37 Ch. D. 260.

(31) *Emp. v. Laxman* [1945] 47 Bom. L.R. 600.

(32) *Wiley v. Stocks* [1909] 26 T.L.R. 41.

(33) *Johnston F. Patent Co.* [1904] 2 Ch. 234; *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658.

(34) *Edelstein v. Schuler & Co.* [1902] 2 K.B. 144.

(35) *Campbell's case* [1876] 4 Ch. D. 470; see also *Webb v. Shropshire Rys. Co.* [1893] 3 Ch. 307; *Anglo-Danubian S. N. & Colliery Co.* [1873] L.R. 20 Eq. 339.

an immediate right to exchange them at their nominal value for shares is invalid as it is capable of being used as a means of issuing shares at a discount (36).

Where a company issued income stock certificates to raise money for its undertaking, it was held that the certificates fulfilled the primary qualification of a debenture, namely, they contained an acknowledgement of indebtedness notwithstanding that the debt was only payable in future and upon contingency of profits being earned by the company. As they contained further common features of a debenture, namely, a charge on the assets of the company, they were debentures within s. 102 of the English Act of 1908 (corresponding to s. 118 of the present Act) (37).

③ "Fixed" and "floating" charges :—If the debenture gives no security on the assets of the company, the debenture-holder's position is no better than that of an unsecured creditor (38). But generally mortgage debentures are issued which usually contain a charge upon the undertaking of the company and all its property, present and future, and may or may not give a charge upon uncalled capital. The charge may either be "fixed" or "floating." When the charge is "fixed" it affects the title to the property and the company can only deal with the property affected subject to the charge. But when the charge is a "floating" one, the company may, in the ordinary course of business, deal with the property covered by the charge, mortgaging, selling, disposing of it or using it up as the business requires, at any time before the charge attaches (39). It remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes (40). In *Illingworth v. Houldsworth* (41) Lord Macnaghten said : "A specific charge is one that without more fastens on ascertained or definite property capable of being ascertained and defined, whereas a floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." As pointed out by Buckley L. J., "a floating security is not a future security, it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystalize into a fixed security" (42). The terms "floating security" and "floating charge" are synonymous (43). See notes to ss. 125, 120 and 123, *post*.

**50. Debenture stock** :—Debenture stock is of the same nature as ordinary debentures (44) except that instead of each bond securing a definite amount, the whole sum secured is treated as a single stock, and certificates are issued declaring the holder to be entitled to a definite sum, part of the stock. The debenture stock may be repayable on a fixed date or may be irredeemable.

(36) *Moseley v. Koffyfontein Mines* [1904] 2 Ch. 108.

(37) *Lemon v. Austin Friars &c. Trust* [1925] Ch. 1.

(38) *Spiral Globe Ltd.* [1902] 1 Ch. 396.

(39) *Florence Land Co.* [1878] 10 Ch. D. 530; *Wheatley v. Silkstone &c. Coal Co.* [1885] 29 Ch. D. 715.

(40) *Government Stock &c. Investment Co. v. Manila Ry. Co.* [1897] A.C. 81.

(41) [1904] A.C. 355 at p. 358.

(42) *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 999.

(43) *Illingworth v. Houldsworth* [1904] A.C. 355.

(44) *Murray v. Herring* [1908] W.N. 153, [1908] 2 Ch. 493.

**(13) "Director" :—**"Director" includes any person occupying the position of a director (45). So it seems that a secretary or manager occupying the position of a director is included within the term.

The true position of directors seems to be that of agents for the company with the powers and duties of carrying on the whole of its business, subject to the restrictions imposed by the articles of association and the statutory provisions (46). But the directors are not agents for the shareholders (47), nor are they trustees for the creditors of the company (48), nor are they trustees in whom the property of the company is vested in trust for any specific purpose within the meaning of s. 10, Limitation Act (49).

As agents of the company they cannot make secret profits. "No man can in this Court," said Lord Cairns, L. C., "acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict" (50).

For the powers, duties and liabilities of directors see notes to s. 252.

**(14) "District-Court" :—**This is cl. (6) of s. 2 (1) of the previous Act.

**52. (15) "Document" :—**This definition is new. This is based on the definition in s. 455 (1) of the English Act of 1948—*Notes on Clauses*.

The word "requisition" and the words after "and registers" have been inserted by the Lok Sabha.

**53. (16) "Existing Company" :—**The word "existing" would need be read as excluding what might be broadly called non-Pakistan companies, that is, as excluding companies otherwise falling within cl. (7) of sub-s. (1) of s. 2 of the old Act, but which had been formed and registered in territories not forming part of the territories of Pakistan (51). See s. 3 (1) (ii).

**54. (17) "Financial year" :—**This definition is new. It is based on that in s. 455 (1) of the English Act of 1948. The provision that the financial year should not exceed 15 months or in special cases 18 months has been embodied more appropriately in a substantive section, *viz.*, s. 210 which provides for the laying of accounts of the company before the annual general meeting—*Notes on Clauses*. The proviso has been added by the Joint Committee "to make it clear that in relation to an insurance company "financial year" means the calendar year" (*vide* para 10 of the J.C.R.). See s. 210 (4).

For definition of "body corporate" see cl. (7) of s. 2. For definition of "insurance company," see s. 2 (21).

**54A. (18) "Government Company" :—**This definition has been inserted by the Joint Committee (*vide* J. C. R., para 10 (4)).

See s. 617 and notes thereto.

**(19). "Holding company" :—**See s. 4 and notes thereto.

**(20). "India" :—**This definition is new. For the definition of "India" in the General Clauses Act see Note 33, under s. 1 *ante*.

(45) *Coventry & Dixon's case* [1880] 14 Ch. D. 660.

(46) *Faure Electric Accumulator Co.* [1889] 40 Ch. D. 141. See also *Ferguson v. Wilson* [1866] 2 Ch. App. 77 and *Gramophone & Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89 (C.A.).

(47) *Poole, Jackson & Whyte's case* [1878] 9 Ch. D. 322.

(48) *Ashbury Ry. v. Riche* [1875] L.R. 7. H.L. 653.

(49) *Narasimha v. Official Assignee* [1931] M. 58; *Kathiawar Trading Co. v. Virachand* [1894] 18 Bom. 119.

(50) *Parker v. MacKenna* [1874] 10 Ch. App. 96.

(51) *Bank of Commerce, Ltd.* [1949] Dac. 23, 53 C.W.N. (D.R.) 126, Pak. C. [1949] Dacca—per Ormond J.

(21). **"Insurance company"** :—This is cl. (8) of s. 2 (1) of the previous Act.

55. (22) **"Issued generally"** :—This definition is new. It is based on s. 455 (1) of the English Act of 1948. It is however made clear that an issue to existing members or debenture-holders and others will also fall within the scope of the definition—*Notes on Clauses*.

55A. (23) **"Limited company"** :—This definition has been inserted by the Joint Committee [*vide* J. C. R., para 10 (4)].

56. (24) **"Manager"** :—This definition is substantially the same as in the previous Act. The managing agent has however been specifically excluded from the term manager. It has also been made clear that a manager must be an individual and not a firm or a body corporate—*Notes on Clauses*. Unless a person is in charge of the entire or substantially the entire business of a company, he cannot be deemed to be the manager thereof (52).

"A manager would be," said Blackburn, J., "in ordinary talk a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole affairs of the company" (53). "'Manager' means a *de facto* manager" (54). S. 84 of the English Larceny Act, 1861 which makes it misdemeanor for "any director, manager, or public officer of any body corporate or public company" to publish false statements with intent to deceive or defraud, applies to a person who, without having been appointed an officer of the company, has in fact acted throughout as manager of the affairs of the company (55).

• An acting manager of a bank is a "principal officer of the corporation" and he is entitled to subscribe and verify plaints for the bank within s. 435 (now Or. 29, r. 1), C. P. Code (56). If the manager of a company gives false account to avoid payment of tolls, the company would be liable (57). A manager was entitled to prove in the winding up of the company the sum which it had been agreed to be paid by the articles of association in case of his removal (58), or dismissal (going into voluntary liquidation being equivalent to a dismissal) (59). For the principle upon which the amount for salary and compensation payable to the manager of a company in respect of his engagement which had been suddenly terminated by winding up would be calculated, see *English J. S. Bank, Yelland's case* [1867] L.R. 4 Eq. 350.

Communications of a defamatory character touching a servant of a company contained in letters from the manager to the directors of the company and to another of its servants, where ostensibly in the interests of the company, were held to be privileged. The *onus* lay on the plaintiff to prove that the defendant believed them to be untrue when he made them or acted maliciously in making them (60).

57. **Distinction between manager and managing agent** :—*First*, a managing agent must, it has been held under the old Act, be entitled as of right to the management of the affairs of the company; *secondly*, a manager must always work subject to the control and direction of the directors, whereas the control and direction of the directors over the managing agent may be modified by the terms of the agreement and *thirdly*, a managing agent may be a person, a firm or a body corpo-

(52) *Basant v. Emp.* [1918] 19 Cr. L.J. 215, 43 I.C. 791.

(53) *Gibson v. Barton* [1875] L.R. 10 Q.B. 329 (336).

(54) *Ibid* at p. 341 per Lush, J.; see also *King v. Lawson*, *infra*.

(55) *King v. Lawson* [1905] 1 K.B. 541.

(56) *Delhi & London Bank v. Oldham* [1894] 20 I.A. 139, 21 Cal. 60 (P.C.).

(57) *Mousell Bros. v. London & N. W. Ry. Co.* [1917] 2 K.B. 836.

(58) *Exp. Logan* [1870] L.R. 9 Eq. 149.

(59) *Imperial Wine Co.* [1872] L.R. 14 Eq. 417.

(60) *Leeshman v. Holland* [1890] 14 Mad. 51.

rate, but a manager can only be an individual (61). Normally if a person is called a managing agent, he would be deemed to be carrying on the business of managing agency and would not be a servant of the company (61). See the next Note.

**58. (25) "Managing agent"** :—This definition was for the first time introduced by the amending Act (XXII) of 1936 on account of importance of the functions of managing agents in India. The distinction between "manager" and "managing agent" under the old Act was *first*, while the manager must be a person, the managing agent might be a person, firm or company; *secondly*, the latter was *entitled*, as of right, to the management of the company by virtue of an agreement with the company, while the manager was the person who *had* actually the management of the company whether under an agreement or not (a director who actually managed a company without an agreement with the company for that purpose might be a manager, not a managing agent); and *thirdly* the extent of the control and direction by the directors might be modified by agreement in the case of managing agents, but not in the case of managers. By contrast between clauses (9) and (9-A) of the old Act a manager could not, it seems, be a firm or company. The General Clauses Act, 1897 however says that the word "person" shall include any company, association or body of individuals, whether incorporated or not. For distinction between manager and managing agent, see Note 57.

The words "except to the extent otherwise provided for in the agreement" which occurred in the definition in the old Act have been omitted in the present definition which is based on the definition suggested by the C.I.C.—*Notes on Clauses*. "The distinguishing characteristics of the former ("manager") should be that he should be (a) an individual, (b) in charge of the whole or substantially the whole of the management of a company, (c) whether under formal contract of service or not and (d) serving under the administrative control and supervision of the directors. A managing agent on the other hand, may be (a) a person, firm or a company, (b) in charge of the whole or substantially the whole of the management of a company, but (c) deriving his or its authority by virtue of an agreement with the company or by virtue of the memorandum or articles of association containing the terms of such agreement. Unlike a manager, who would be administratively under the control and supervision of the directors, the latter's control over a managing agent would be exercised only in the terms of the agreement or the provisions of the Act"—*Vide C. L. R. Rep., para 27*.

In this clause the words "body corporate" in two places have been inserted by the Joint Committee. For definition of "body corporate", see s. 2 (7).

**59. Managing agency Contract** :—A Hindu undivided family was not a person as defined in the Companies Act, 1913 as amended in 1936 and therefore it could not enter into a managing agency contract as a legal entity (62). The commission earned under such a contract by a member of a coparcenary would *prima facie* be his individual property, unless it was shown that the rights were acquired by utilising any portion of the joint family property (62).

Where an agreement entered into by the managing agents is unreasonably and excessively onerous and such as should not be entered into in the usual way and according to the ordinary course of business, it is *ultra vires*, and the company is entitled to repudiate it (63).

**59A. Hindu undivided family** :—A Hindu undivided family is not a "person"

(61) *Comr. of Income-Tax v. Vershani* [1954] A. 58.

(62) *Murugappa v. Comr. of Income Tax* [1952] M. 828.

(63) *Ram Chand v. Diamond Jubilee Flour Mills* 10 P.R. 1905, 100 P.L.R. 1905.

as defined in the Companies Act, and therefore it is incapable of entering into a managing agency contract as a legal entity (64).

**60. (26) "Managing director" :—**This definition is new. The C. L. C. Rep. says: "One of the principal lacunae in the Act of 1913 is the absence of any statutory provision relating to the terms and conditions of appointment of managing directors and managers. This lacuna is all the more noticeable, inasmuch as, while the powers and functions of managing directors and managers are in many respects similar to those of managing agents, unlike the latter, the conditions of appointment of the former have not been brought under control and regulation. We suggest that there should be statutory provision for this purpose and recommend the insertion of a new section in the Act on this subject (see s. 315 *et seq.*)..... Our main proposals are as follows :—(i) no firm or body corporate should be appointed as a manager; (ii) no person should be eligible to be appointed as a manager or a managing director for more than two companies and any such appointment for the second company should be made with the unanimous resolution of the board of directors passed at a board meeting; (iii) the term of appointment for manager or managing director should be limited to five years at a time, although an exception should be made in the case of technicians and consultants; (iv) if a managing director or manager is to be paid any commission or remuneration in the shape of commission on profits, it should be based on net profits as defined in section 87c of the Act (see now s. 349 *et seq.*); (v) compensation, if any, admissible to a managing director or manager for loss of office would be payable in the same circumstances as compensation would be payable to a managing agent"—*para 146, C.L.C.R.*

In this clause after the words "passed by the company" the words "in general meeting or by its Board of" have been inserted by the Joint Committee.

**60A.** "The distinction between a manager and a managing director", says C. L. C. R., "as we see it, is that whilst the latter derives his power of management from an agreement with the company these powers need not necessarily extend to the whole or even substantially the whole of the company's affairs but may be and very often are restricted to one particular aspect of such affairs; unlike a managing agent the managing director must be an individual director of the company—*Vide para 27, C.L.C.R.*

**61. Managing director's position :—**A managing director is an ordinary director entrusted with special powers (65). He is not a clerk or servant so as to be entitled to salary in preference to other creditors (66). A director or a managing director is in no way a servant of the company: he is the agent of the company for carrying on its business (67). But the principles applicable to the issue of an injunction at the instance of a dismissed servant ought also to apply in the case of a dismissed agent, *e.g.*, a managing director (67). Persons dealing *bona fide* with a managing director are entitled to assume that he has all the powers which according to the constitution of the company a managing director can have (68). Where a company undertakes to sell the shares belonging to a shareholder, the position of the managing director in negotiating and completing the sale is one of fiduciary cha-

(64) *Murugappa v. Comr. of Income-tax* [1952] M. 828.

(65) *Newspaper Proprietary Syndicate* [1900] 2 Ch. 349, 350.

(66) *Ibid*; *Normandy v. Ind. Coope & Co.* [1908] 1 Ch. 84 & s. 530 and notes; *Dehra Dun Mussoorie E. Tramway Co. v. Jagamander* [1932] A. 141, [1931] A.L.J. 1038, 134 I.C. 244.

(67) *Gulab Singh v. Punjab Zemindara Bank* [1942] L. 47, 13 P.L.R. 619, reversing on this point [1940] L. 243.

(68) *Dehra Dun Mussoorie E. Tramway Co. v. Jagamandar* (supra).

racter. Utmost good faith should be observed in such cases (69). If any advantage is obtained by the managing director as the fruit of the sale, the benefit must go to the owner of the shares (69). For a case of misrepresentation by the managing director see the case noted below (70).

**62. Appointment :—**Directors cannot appoint a managing director (71) or delegate their powers and duties to other persons (72) in the absence of provisions in the articles empowering them to do so (73). If the articles gave the power of appointing a managing director to the board of directors, the company in general meeting could not make the appointment even if there was another article empowering them to manage only subject to such regulations as the company might prescribe (74). Where powers are delegated under the provisions of the articles, the directors are absolved from liability for relying on the delegates (75). Reg. 72 of Table A of the old Act did not expressly authorize any delegation of powers, but the authority was implied under the regulation (76). Such delegation or appointment was to be made at a meeting where proper quorum was present excluding the interested directors (77).

Where the power was given to the directors to appoint a managing director for such period as they thought fit and to revoke the appointment, they could by agreement appoint a managing director for life, and unless they reserved power in the agreement to revoke the appointment, the company could not dismiss the managing director, and if it did so he would be entitled to damages (78). Where a managing director was appointed by agreement for a certain number of years at a certain salary and before the expiration of the period a resolution supported by the managing director was passed for voluntary winding up of the company as by reason of its liabilities it could not continue its business, the managing director was entitled to damages for breach of the agreement (79). If a life director was appointed managing director without specification of the terms for which he would hold the office, he would be liable to be removed by the directors (80).

When it is admittedly desirable that a managing director should be appointed, but the directors are unable, owing to internal friction and faction, to make the appointment under the powers conferred by the articles, the company in general meeting has power to make the appointment (81).

**63. Agreement :—**By an agreement between a company and a person, who was then a director of the company, the latter was appointed managing director for a term of ten years. Art. 91 of the company's articles of association provided that a managing director should "subject to the provisions of any contract between him and the company be subject to the same provisions as to . . . removal as the other directors of the company and if he ceases to hold the office of director he shall *ipso facto* and immediately cease to be a managing director." Art. 105 gave the company the power to remove a director before the expiration of his period of office. It was

(69) *Co-operative Co. v. Bhagwan Das & Co.* [1930] A. 615, [1930] A.L.J. 1396. 128 I.C. 299.

(70) *Briss v. Roshar* [1953] 1 A.E.R. 717 (C.A.).

(71) *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 148, 159; *Nelson v. James Nelson & Sons* [1914] 2 K.B. 770 at p. 779.

(72) *Howard's case* [1866] 1 Ch. App. 561.

(73) *Horn v. Henry Faulder & Co.* [1908] 99 L.T. 524.

(74) *Thomas Logan Ltd. v. Davies* [1911] 104 L.T. 914.

(75) *Weir v. Bell* [1878] 3 Ex. D. 238 (C.A.).

(76) See *Cartmell's case* [1878] 9 Ch. App. 691, 695.

(77) *Ramaswami v. Madras Times &c.* [1915] 38 Mad. 991.

(78) *Nelson v. James Nelson & Sons* [1914] 2 K.B. 770.

(79) *Fowler v. Commercial Timber Co.* [1936] 2 K.B. 1 (C.A.).

(80) *Foster v. Foster* [1916] 1 Ch. 532.

(81) *Foster v. Foster* (supra); see also *Barron v. Potter* [1914] 1 Ch. 895.



held by the House of Lords (Viscount Maugham and Lord Romer dissenting) that it was an implied term of the said agreement that the company should not remove the managing director from his position as director during the terms of years for which he was appointed managing director, that the wrongful removal of him from his position as director and managing director was the company's act none the less because it required two acts and not one only for its accomplishment and that in respect of the breach of agreement the managing director was entitled to the damages (12,000 l.) awarded by the trial judge (82). In a very recent case the House of Lords held that cl. (1) of the agreement did not limit the power of the Board under the subsequent words of the agreement and that upon the true construction of the agreement the managing director's duties could be confined to the management of the subsidiary companies and that therefore there was no breach of the agreement by the resolution of the Board (83). If a person enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an obligation on his part to do nothing of his own motion to put an end to the state of circumstances under which alone the arrangement can be operative (84). The agreement with the managing director of a company provided: "The managing director shall not, at any time, while he shall hold the office or afterward solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company." Shortly after determination of the agreement the defendant (managing director) opened a business of similar nature. In an action by the company to enforce the contract the Court of Appeal (reversing the decision of Farwell J.) held that the covenant was not wider than was reasonably necessary for the protection of the plaintiff company's trade, and was therefore enforceable by injunction (85).

Where in pursuance of the articles of association acted upon by the company a member was appointed its managing director and acted for 11 years in that capacity, the articles constituted an implied contract between the member and the company. In a suit by the managing director, who was removed by the company by a special resolution, for a declaration that he is still the managing director, it was found that the resolution removing him from office was *ultra vires*, consequently the managing director was held entitled to the declaration and the same could not be refused on the ground that the company might subsequently remove him from office by a valid resolution (86).

**63A. Powers:**—Where there are no provisions in the articles or in the contract appointing managing agents that the powers thereby conferred on them should be subject to the control or assent of the directors, the latter have no right to interfere otherwise than as representing the company in virtue of their general power of management (87).

Where a general power of attorney from a company in favour of the managing director or manager is relied upon, it would be necessary to show from the articles or the memorandum of association that the directors can give such a power of attorney (88).

Where the articles provided that "deeds, hundies, cheques, certificates and other instruments shall be signed by the managing director, the secretary and the working

(82) *Southern Foundries (1926) Ltd. v. Shirlaw* [1940] A.C. 701.

(83) *Harold Houldsworth & Co. (Wakefield) Ltd. v. Caddies* [1955] 1 A.F.R. 725 (H.L.).

(84) *Southern Foundries (1926) Ltd. v. Shirlaw*, *supra* per Lord Atkin.

(85) *Gilford Motor Co. v. Horne* [1933] Ch. 935 (C.A.); see also *Spink (Bournemouth) Ltd. v. Spink* [1936] 1 Ch. 544.

(86) *Gulab Singh v. Punjab Zemindara Bank*, [1940] L. 243, 190 I.C. 819.

(87) *Nusserwanji v. Gordon* [1882] 6 Bom. 266.

(88) *Abdul v. Mafassal Bank* [1926] A. 497, 24 A.L.J. 593.

director on behalf of the company and shall be valid", a mortgage purporting to be executed by the company but signed not by the managing director but by the other two officials mentioned above was invalid notwithstanding the facts that the mortgagee might have acted in good faith and the money might have been applied to the purposes of the company. The mere fact that the services of the managing director were no longer available to the company would not make the execution valid (89).

**64. Duties:**—The duties of a managing director are of a higher standard than of an ordinary director, and where by any act of the managing director, which is inspired by motives of personal gain, the company suffers loss, the managing director is liable to make good such loss (90).

**65. Acting in private capacity cannot bind company:**—A company is not responsible for acts done by its managing director, when he is acting in his private capacity and not in pursuance of any authority given by the company (91). The manager or managing director of a mill company has no implied authority to purchase on behalf of the mill the liability of a stranger and still less that of his own manager or managing partner in a private transaction of his own (92).

**66. Managing director's remuneration:**—If the managing director's commission is on "net profits," or "profits earned by the company," this means the receipts of the year over the current expenses and out-goings of the year, *i.e.*, the fund which but for such commission might for that year be lawfully applied in payment of dividend, and any liability for excess profits duty for that year must be deducted in arriving at the "net profits" (93). For meaning of "net profit" see s. 349 *post*.

**67. Arrears of salary:**—Arrears of salary due to a managing director are not debts due to him in his character as a member within the meaning of s. 426, sub-s. (1) (g) (94).

**68. Outsiders dealing bona fide with managing director:**—Persons dealing *bona fide* with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have (95). All persons dealing with a company must ascertain the limitations imposed by the articles, but they are not bound to draw any direct or obvious inferences from the provisions thereof, nor is there any obligation cast upon them to see that such directors are properly appointed, or that they have acted exactly in accordance with the manner therein prescribed (95).

Where a company, formed for the purpose of carrying on business as an investment trust, authorised one of its managing directors to borrow moneys from a firm and he borrowed large sums from that firm and utilized them for gambling in differences on behalf of the company and also embezzled large sums, it was *held* that in a winding up of the company the lending firm was entitled to claim as creditor for the amount lent and interest, as the lending firm had no knowledge that the managing director of the company was abusing his authority (96).

(89) Venkataswamy v. Ramamurthy [1934] M. 579, 67 M.L.J. 327.

(90) Bank of Oudh v. Nawab Ali Khan [1926] O. 153, 92 I.C. 50.

(91) McGowan & Co. v. Dyer [1873] 8 Q.B. 141.

(92) Motilal v. Bombay Cotton Manufg. Co. [1915] 19 C.W.N. 621 (P.C.), 21 C.L.J. 524.

(93) Patent Castings Syndicate v. Etherington [1919] 2 Ch. 254; Vulcan Motor & Engineering Co. v. Hampson [1921] 3 K.B. 597.

(94) Dale & Plant Ltd. [1889] 43 Ch. D. 255.

(95) Ram Baran v. Maffassil Bank [1925] A. 206, 83 I.C. 142; see also Biggerstaff v. Rowatt's Wharf [1896] 2 Ch. 93, 102; Abdul v. Maffassil Bank (*supra*).

(96) V. K. R. S. T. Firm v. Oriental Investment Trust [1944] 2 M.L.J. 77.

A bank acting in good faith may credit to the managing director's own overdrawn account sums drawn from the company's accounts by cheques signed by the managing director (97).

The grant of a permanent lease may be within the scope of the apparent authority of a managing director (98). Outsiders are entitled to presume that the managing director has acted regularly within the scope of his authority in the manner provided in the articles (98).

A company suing for a declaration that they are the managing agents of another company must ask consequential relief of injunction to restrain the other company to interfere with the discharge of their duties as managing agents, otherwise no declaration will be granted by the Court (99).

**69. Retirement and removal** :—If there is no provision in the articles of the managing director's exemption from retirement by rotation, he ceases to be the managing director on his failure to be re-elected after retirement, even if the directors have purported to appoint him for a fixed period (1). But where it is an implied term of the agreement between the company and the managing director that the latter should not be removed from the position of director during the term of years for which he was appointed, he cannot be removed from the position of managing director during that term, even by altering the articles of association (2).

The power to determine the appointment of a managing director was not a breach of contract for the company to dismiss the former without notice, where the company by its articles expressly retained such power in its hands (3). The managing director had no special right in such a case to receive any particular notice of the termination of his employment when the company decided to determine it and did so by a resolution in a general meeting (4).

**69A. (27) "Member"** :—This negative definition has been inserted by the Joint Committee [(*Vide* J. C. R., para 10)]. For the real definition of "member" see s. 41 *post*.

**70. (28) "Memorandum"** :—The definition has been brought into line with the definition of "articles" by referring to alterations made under the previous companies law as well as this Act—*Notes on Clauses*.

**70A. (29) "Modify" and "modification"** :—These definitions have been inserted by the Joint Committee [*Vide* J.C.R. para 10 (4)].

**71. (30) "Officer"** :—The definition in the previous Act had been expanded so as to cover the case where the managing agent is a firm or a body corporate. In such a case a partner in the firm or a director, managing agent or manager of the body corporate will be treated as an officer. \* \* \*—*Notes on Clauses*.

This clause has been recast by the Joint Committee [see para 10 (4)].

**72. (31) "Officer who is in default"** :—This definition is new. See s. 5 and notes thereto.

**Secretary** :—For the position powers and duties of a secretary see notes s. 193 *post*.

(97) *Bank of New South Wales v. Goulburn Valley &c. Ltd.* [1902] A.C. 543.

(98) *Khulna Loan Co. v. Jahir* [1914] 24 I.C. 209.

(99) *Boulton Bros. v. New Victoria Mills* [1929] A. 87, 25 A.L.J. 1119.

(1) *Bluett v. Stutchbury's Ltd.* [1908] 24 T.L.R. 469.

(2) *Shirlaw v. Southern Foundries Ltd.* [1939] 2 K.B. 206, on appeal to the House of Lords, *Southern Foundries (1926) Ltd. v. Shirlaw* [1940] A.C. 701.

(3) *Read v. Astoria Garage (Streatham) Ltd.* [1952] 1 A.F.R. 922.

(4) *Ibid* [1952] 2 A.E.R. 292 (C.A.).

**73. (32) "Paid up capital or "capital paid up" :—**The insertion of this definition simplified the drafting of the Bill in various places—*Notes on Clauses*.

**74. (33) "Prescribed"** The definition in the previous Act has been altered by giving rule making powers relating to winding up of companies to the Supreme Court in consultation with High Courts, instead of to the High Courts.

The words "including sub-section (3) of section 550" have been inserted by the Joint Committee.

For definition of "Central Government" see the new clause(8) of s. 3. General Clauses Act, 1897 inserted by the Adaptation of Laws Order, 1950. See also note 123 to s. 10 *post*.

**75. (34) Previous companies law" :—** The expression occurs in many places in the Act, and has been comprehensively defined in s. 3 (1) (ii) of the Act.—*Notes of Clauses*. See that section and notes thereto.

**(35) "Private company" :—**Sec s. 3 (1) (iii) and notes thereto.

**76. (36) "Prospectus" :—** This definition is based on that in s. 455 (1) of the English Act of 1948. The words "but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed" which had been wrongly introduced by the amending Act XXII of 1936 have been omitted.—*Notes on Clauses*. Before that amendment it was held by the Calcutta High Court that an advertisement in a newspaper offering shares to the public for sale was a prospectus, although the advertisement specially referred to a prospectus a copy of which was available on application and a copy of which had been duly filed with the Registrar (5). The word "prospectus" means that document by which capital is offered to the public and upon the basis of which the applicant has actually subscribed (6).

**77. Public :—**The word public has not been defined in the Act. It appears that the word does not include existing members and debenture-holders (7). "The 'public' in the definition", observed Lord Sumner, "is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers but makes further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be open to any one who brings his money and applies in due form whether the prospectus was addressed to him on behalf of the company or not. A private communication is not thus open" (8).

For documents which are deemed to be prospectus, see s. 64 *post*.

**78. Offer to the public:—** What is an offer to the public depends upon the circumstances of each particular case. It appears that an offer to the public means an offer by the company to any one who chooses to come in and take shares (9).

An offer of shares limited to the members of an existing company appears to be not an offer to the public (10); nor does circulation by directors amongst their own friends of a number of documents in the form of an ordinary prospectus and headed "strictly private and confidential" amount to an offer to the public (11). An offer

(5) *Pramatha v. Kali Kumar* [1925] 52 Cal. 110, 29 C.W.N. 523.

(6) *Roussell v. Burnham* [1909] 1 Ch. 127.

(7) *Burrows v. Matabele Gold Co.* [1901] 2 Ch. 23, 27; *Booth v. Africander Co.* [1903] 1 Ch. 295; *Nash v. Lynde* [1929] A.C. 158.

(8) *Nash v. Lynde* [1929] A.C. 158, 169.

(9) *Sherwell v. Combined I. M. Syndicate* [1907] W.N. 110, 23 T.L.R. 482, 483.

(10) *Booth v. New Afrikander Co.* (supra); *Burrows v. Matabele Gold Co.* (supra).

(11) *Sherwell v. Combined I.M. Syndicate* (supra); but see *South of England Natural Gas Co.* [1911] 1 Ch. 573.

to the public by the liquidators of a company is not equivalent to the issue of a prospectus by the company (10).

In the under-noted case (12) Lord Justice Scrutton observed as follows: "*In re South of England Natural Gas Co.* (13), where some 3,000 copies of a prospectus marked 'for private circulation only' were printed and issued to shareholders of gas companies in which the promoter was interested, Swinfen Eady J. held that the prospectus was issued to the public. On the other hand in *Sherwell v. Combined I. M. Syndicate* (14) where some of the directors without the authority of the company sent a prospectus marked 'strictly private and confidential, not for publication' to some of their friends, Warrington J. said that no action lay against the company, but also said that 'whether or not capital has been offered to the public was a pure question of fact..... It meant an offer of shares to any one who should choose to come in.' I agree with this." The House of Lords have held that a prospectus is not "issued", if it is shown to one person privately and not as a member of the public (8).

See now sub-ss. (1) to (4) of s. 67 *post*.

See notes to s. 55.

The word 'debenture' includes debenture stock [see s. 2 (12) *ante*]. For statement in lieu of prospectus see s. 70.

**79. (37) "Public company":**—See s. 3 (1) (iv) and notes thereto.

**79A. (38) "Public holiday":**—This definition has been inserted by the Joint Committee [*vide* J. C. R., para 10 (4)].

**79B. (39) "Recognised stock exchange":**—This definition has also been inserted by the Joint Committee [*vide* J. C. R., part 10 (4)].

**(40) "Registrar":**—This is cl. (15) of s. 2 (1) of the previous Act.

**79C. (41) "Relative":**—This definition also has been inserted by the Joint Committee. See s. 6.

**79D. (42) "Schedule" and (43) "Scheduled Bank":** These definitions are new. They have been added as they occur in many places in the Act—*Notes on Clauses*.

**79E. (44) "Secretaries and treasurers":**—This definition has been inserted by the Joint Committee with the following observations: The new definition of 'secretaries and treasurers' is on the same lines as that of 'manager'. The difference consists in this, namely, that while only an individual can be a manager, only a firm or body corporate can be secretaries and treasurers (*vide* J. C. R., para 10).

**79F. (45) "Secretary":**—This definition has also been inserted by the Joint Committee (*vide* J. C. R., para 10).

**80. (46) "Share." Meaning of "share":**—A share in a company cannot properly be likened to a sum of money settled upon, and subject to, executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the company measured, for the purpose of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with the provisions of the Companies Act and made up of various rights and the assignee would be entitled to sue upon it to obtain his appropriate share of money (14).

(12) *Lynde v. Nash* [1928] 2 K.B. 93.

(13) [1911] 1 Ch. 573.

(14) *Borland's Trustee v. Steel Bros. Co.* [1901] 1 Ch. 279; but see *Parbhudas v. Ramlal* [1866] 3 Bom. H.C.R. 69 O.C.

"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding-up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by the articles and are not of the nature of real estate" (15).

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The position of shareholders in a company is not analogous to that of partners *inter se*. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is however not the case of a company which stands as a separate juristic entity distinct from the share-holders (17).

A share in such a company as a manufacturing company carrying on its business in a foreign country resembles a chose in action in this respect only that it is assignable, and the assignee would be entitled to sue upon it to obtain his appropriate share of the net profits, just as the original holders would be (18).

(47) "Subsidiary company" or "subsidiary":—See s. 4 and notes thereto.

81. (48) "Total voting power":—This definition is new. It has been thought desirable to insert it as the expression occurs in many places in the Act—*Notes on Clauses*. The definition has somewhat been altered by the Joint Committee by adding the words "on a poll" before "at a meeting of such body."

82. (49) "Trading corporation":—This definition was, for the first time, inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Entries 13 and 44 in list I (Union List) in the Seventh Schedule to the Constitution are as follows:

"43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies,

"44. Incorporation, regulation and winding up of corporations whether trading or not, with objects not confined to one State, but not including universities."

The effect of this definition is that a "trading corporation" includes not only, trading corporations as such but also banking, insurance and financial corporations, but it does not include corporations with the object of carrying on business in one State only, or co-operative societies.

82A. (50) "Variation":—This definition has been inserted by the Joint Committee [*Vide J. C. R.*, para 10 (4)].

83. Other definitions:—In addition to the definitions contained in s. 2 the following words and expressions have been defined in the body of the Act:—

Annual general meeting	s. 166	Creditors' voluntary winding-up	s. 488 (5)
Company	s. 3 (1) (i)	Equity share	s. 85 (3)
Company limited by guarantee	s. 12 (2) (b)	Equity share capital	s. 85 (2)
Company limited by shares	s. 12 (2) (a)	Existing company	s. 3 (1) (ii)
Contributory	s. 428	Foreign company	s. 591
Court having jurisdiction	s. 10	Foreign register	s. 157 (1)

(15) Hals. 3rd ed., Vol. 6, p. 234.

(16) *Borland's Trustee v. Steel Brothers* [1901] 1 Ch. 279—per Farwell J.

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Company limited by guarantee	s. 12 (2) (b)	Equity share capital	s. 85 (2)
Company limited by shares	s. 12 (2) (a)	Existing company	s. 3 (1) (ii)
Contributory	s. 428	Foreign company	s. 59 <sup>1</sup>
Court having jurisdiction	s. 10	Foreign register	s. 157 (1)

(15) Hals. 3rd ed., Vol. 6, p. 234.

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Holding company	s. 4	Private company	s. 3 (1) (iif)
Investment company	s. 372 (11)	Public company	s. 3 (1) (iv)
Member of company	s. 41	Relative	s. 6
Members' voluntary winding-up	s. 488 (5)	Resolution for voluntary winding-up	s. 484 (2)
Minimum subscription	s. 69 (1), (2)	Share warrant	s. 114 (1), (2)
Officer who is in default	s. 5	Special resolution	s. 189 (2)
Ordinary resolution	s. 189 (1)	Statutory meeting	s. 165 (1)
Person in accordance with whose directions or instructions directors are accustomed to act	s. 7	Statutory report	s. 165 (2)
Preference share	s. 85 (1), (3)	Subsidiary company	s. 4
Preference share capital	s. 85 (1)	Time of opening subscription lists	s. 72 (1) (c)
		Total strength	s. 287 (1) (a)
		Unlimited company	s. 12 (2) (c)

Besides these the following have been defined in the body of the Act for the purposes of particular Parts or Sections of the Act :—

Accrued holiday remuneration	s. 530 (8) (b)	Joint-stock company	s. 566
Agent	s. 240 (6) (b), s. 545 (7)	Officer	s. 203 (6), s. 240 (6) (a), s. 538 (3)
Arrangement	s. 390 (b)	Office or place of profit	s. 204 (5), s. 314 (3)
Assignee	s. 542 (2) (d)	Pension	s. 321 (3)
Charge	s. 124	Principal register	s. 158 (1)
Company	s. 4 (5), s. 202 (2), s. 390 (a)	Promoter	s. 62 (6) (a)
Court	s. 203 (2)	Property	s. 394 (4) (a)
Deed of settlement	s. 579 (4)	Registered office (for purposes of jurisdiction to wind-up companies)	s. 10 (3)
Dissentient shareholder	s. 395 (5) (a)	Registrar of Joint-stock companies	s. 650
Expert	s. 59 (2), s. 604 (2)	Transferee company	394 (4) (b)
Government company	s. 617	Transferor company	395 (5) (b)
India	558 (1), Expln.	Unregistered company	s. 582
Instrument	s. 578 (7)		
Interested director	s. 287 (1) (b)		
Investment company	s. 372 (11)		

**3. Definitions of “company”, “existing company”, “private company” and “public company”.—**(1) In this Act, unless the context otherwise requires, the expressions “company”, “existing company”, “private company” and “public company” shall, subject to the provisions of sub-section (2), have the meanings specified below :—

(i) “company” means a company formed and registered under this Act or an existing company as defined in clause (ii);

(ii) “existing company” means a company formed and registered under any of the previous companies laws specified below :—

(a) Any Act or Acts relating to companies in force before the Indian Companies Act, 1866 (X of 1866) and repealed by that Act;

- (b) The Indian Companies Act, 1866 (X of 1866);
- (c) The Indian Companies Act, 1882 (VI of 1882);
- (d) The Indian Companies Act, 1913 (VII of 1913);
- (e) The Registration of Transferred Companies Ordinance, 1942 (LIV of 1942); and

(f) Any law corresponding to any of the Acts or the Ordinance aforesaid and in force in the merged territories or in a Part B State or any part thereof, before the extension thereto of the Indian Companies Act, 1913 (VII of 1913);

(iii) "private company" means a company which, by its articles,—

- (a) restricts the right to transfer its shares, if any;
- (b) limits the number of its members to fifty not including—

(i) persons who are in the employment of the company, and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

- (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company :

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member;

(iv) "public company" means a company which is not a private company.

(2) Unless the context otherwise requires, the following companies shall not be included within the scope of any of the expressions defined in clauses (i) to (iv) of sub-section (1), and such companies shall be deemed, for the purposes of this Act, to have been formed and registered outside India :—

- (a) a company the registered office whereof is in Burma, Aden or Pakistan and which immediately before the

separation of that country from India was a company as defined in clause (i) of sub-section (1) ;

(b) a company the registered office whereof is in the State of Jammu and Kashmir and which immediately before the 26th day of January, 1950, was a company as defined in clause (i) aforesaid.

This section combines clauses (2), (7), (13) and (13A) of sub-section (1) of s. 2 and s. 2A of the previous Act. The Acts enumerated in s. 3 (1) (ii) are previous companies laws. Proviso (i) to s. 2A of the former Act has become spent and has therefore been omitted—*Notes on Clauses*.

Sub-cl. (e) of cl. (ii) of sub-s. (1) has been inserted and sub-cl. (f) thereof has been altered by the Joint Committee.

**84. Sub-s (1), cl. (i). "Company":**—The word "Company" covers a company registered under the old Act VI of 1882. But the fact that the provisions of the Act of 1913 were made applicable to such a company could not render that company one actually registered under the Act of 1913 (19).

It has been held in Pakistan that both for the period from 1st April, 1914 to 15th August, 1947 and the period after the latter date for the application of the previous Act, the definition of a company in cl. (2) of sub-s. (1) of s. 2 of the old Act must be restricted to a company registered with Pakistan. Hence a company registered in Calcutta was not a company "formed or registered under this Act" within the first part of the definition (20).

Where a bank was registered before the partition of India in Bannu in the N. W. F. Province it became a company registered under the old Act in its application to Pakistan and the Allahabad High Court had no jurisdiction to entertain an application under s. 153 of the old Act in respect of the bank, although it had a branch at Dehra Dun within its jurisdiction (21). It was an unregistered company as defined in s. 270 of the old Act and as such was not a company as defined in cl. (2) of sub-s. (1) of section 2 of the old Act (21).

For the purpose of winding up, an "unregistered company" would be covered by the definition of "company" given in clause (i) (22).

**85. Distinction between company incorporated by Act and one by Royal Charter** :—The distinction between a company incorporated by an Act of Parliament and one incorporated under a Royal Charter is that the former can do such acts only as are authorised directly or indirectly by the statute creating it; the latter, speaking generally, can do everything that an ordinary individual can do (23). Therefore, even though a corporation incorporated by a Royal Charter may have exceeded its powers in entering into a contract, though it may entail forfeiture, the transaction would nevertheless be valid (24).

(19) Chota Nagpur Banking Assn. v. Radha Gobinda [1941] Pat. 561, 194 I.C. 649.

(20) Bank of Commerce, Ltd. [1949] Dac. 23, 53 C.W.N. (D.R.) 126. Pak. C. [1949] Dacca 60—per Ormond J.; Eastern Commercial Bank [1949] 53 C.W.N. (D.R.) 85.

(21) Mohan Lal v. Chawla Bank [1949] A. 778.

(22) Frontier Bank [1951] Simla 145, 52 P.L.R. 349 (F.B.).

(23) Sabaratnam v. O. L. Travancore N. & Q. Bank [1943] M. 111; see also Attorney-General v. Manchester Corpn. [1906] 1 Ch. 643.

(24) Sabaratnam v. O. L. Travancore N. & Q. Bank, supra; see also Ayres v. South Australian Banking Co. [1871] L.R. 3 P.C. 548.

**86. Distinction between incorporated company and partnership :—**One of the leading differences between a company and an ordinary partnership is that in the former a member can, and in the latter he cannot, sell his shares without the consent of all other members (25). An unincorporated company, as distinguished from a partnership, means some association of members, the shares of which are transferable (26). In the case of an incorporated company, besides the transferability of its shares there are other important distinctions, e.g., while in an ordinary partnership each partner is personally liable for all debts contracted or all wrongs committed by the firm (27), in an incorporated limited company the members have no individual liability in these matters and their personal liability is satisfied as soon as they paid the calls (28). There are other fundamental differences between a company incorporated under this Act and a partnership. For example, in a partnership one partner cannot transfer his share without the consent of the other partners, while in a limited company no such consent is necessary, and they are freely transferable, except so far as is restricted by the articles of association (29). In a partnership each partner is an agent of the firm to make contracts (30), while the members of a limited company are not its agents for any purpose whatsoever. Again the liability of each partner for the debts of the firm is unlimited, while that of each shareholder in a limited company may be limited by shares or guarantee. A limited company cannot buy its own shares (31).

Where a company is not registered under the Act, the plaintiff must make each individual member of the company a defendant, and he cannot escape this obligation by stating in his plaint that he has been unable to discover who the individual members of the company are (32). As to the provision for allowing partners to sue and be sued in their firm name, see Or. 30, C. P. Code.

**87. Club :—**An ordinary club is formed upon the tacit understanding, judicially recognized, that no member, as such, becomes liable to pay to its funds or otherwise, any money beyond the subscriptions required to be paid by its rules (33). Where the aforesaid fundamental condition or distinguishing feature was lacking, the caste or association or *sabha* was not like a members' club (34). The secretary of a club cannot, unless he has specially accepted a liability, be sued personally on a contract entered into on behalf of the members of the club by his predecessor in office; nor can the members be collectively sued through their secretary as their representative (35).

The relationship between the members of an unincorporated members' club is governed by the law of contract, and if the members have agreed to certain terms which are embodied in the rules, those rules must govern this relationship. If the rules provide that decision on a particular question must be by a majority, the decision would bind all the members, unless the act complained of is a fraud on the

(25) *Re Russel Institution* [1898] 2 Ch. 72 at p. 80; S. 31, Indian Partnership Act (IX) of 1932.

(26) *Queen v. Registrar* [1891] 2 Q.B. 598 at p. 610.

(27) Indian Partnership Act, 1932, ss. 25 & 26.

(28) *Oakes v. Turquant* [1867] L. R. 2 H.L. 325.

(29) *See Ontario Jockey Club v. McBride* [1927] A.C. 916 P.C.).

(30) Indian Partnership Act, 1932, s. 18

(31) S. 77 *post*.

(32) *Ganesh Singh v. Mundi Forest Co.* [1899] 21 All. 346.

(33) *Wise v. Perpetual Trustee Co.* [1903] A.C. 139 (P.C.); *Balkrishna v. Balu Subudhi* [1949] Pat. 284.

(34) *Balkrishna v. Balu Subudhi* (*supra*); see also *Royal W. I. Turf Club* [1944] 47 Bom. L.R. 916.

(35) *New Club v. Sadulla* [1898] 20 All. 497.

minority or is *ultra vires* the association. In all other matters, about which the rules are silent, the majority does not have any right to coerce the minority (36).

In the absence of any rule in the rules of the club laying down the circumstances and the manner in which the dissolution of the club can take place, such dissolution cannot be brought about by a majority vote. The club can be dissolved only if all the members unanimously agree that it be dissolved (36).

In a case where the rules are silent, the minority is unreasonable and the majority has decided upon a dissolution, the Court can presumably go into the question whether it is just and proper that the club should be dissolved, and if the Court comes to this conclusion, it would probably refuse to give the minority any relief in case they have come to Court as plaintiffs, or in case the minority have been driven to seek the assistance of the Court, it would probably assist them (36).

The Court is not however bound to accept the wishes of the minority as regards dissolution of the club (36).

As the club is not a profit sharing business the law of Partnership does not apply. Ss. 270 and 271 of the previous Companies Act related to a company which had a place of business and they could not refer to a club (36).

An unregistered and non-proprietary club is not a judicial person and as such cannot sue or be sued. Where it has to be made liable the proper course is to sue individually the members or to sue only those persons who have rendered themselves personally liable in respect of a contract or tort as the case may be (37).

88. *Quorum*:—Ordinarily where a committee or other body, e.g., a club, is empowered to act by a certain number of members as quorum, it is well established that there is no quorum and the proceedings of the meeting are invalid, unless notice of the meeting is given to all (34).

89. **A company is a distinct legal persona**:—A company formed or registered under the Act is a distinct legal entity (38). It can own and deal with property, sue and be sued in its own name, contract on its behalf and the members are not personally entitled to the benefits or liable for the burdens arising therefrom. Once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant (39). It is altogether a different person from the subscribers to the memorandum of association even if they consist of a family, only one of whom holds all the shares, the others holding one share each (40) (see notes to s. 34). But it does not necessarily follow that every alleged transaction between such individual and the company would be valid, or that it would represent a real transaction (41). Where a company is duly incorporated, the Court should start with the presumption that it is a separate entity from the individual, although that individual may practically hold all the shares (41). In this case it was held that the company was not a genuine company at all, but merely the assessee of the income-tax himself disguised under the legal entity of a limited liability company.

The word "person" in Or. 33 (*suit informā pauperis*) of the Code of Civil Pro-

(36) *Barwell v. Jackson* [1948] A. 146 (S.B.), [1947] A.L.J. 637.

(37) *G.I.P. Ry. Senior Institute v. Mohit Kumar* [1954] N. 29.

(38) *Salomon v. Salomon & Co.* [1897] A.C. 22; for other cases see notes to s. 34; *Ram Kanai v. Matheuson* [1915] 42 I.A. 97, 19 C.W.N. 585, 42 Cal. 1029; *Rangoon E. T. & Supply Co. v. King-Emp.* [1933] 11 Rang. 162.

(39) *Salomon v. Salomon & Co.* (supra).

(40) *Salomon v. Salomon & Co.* (supra); *Gramophone & Typewriters v. Stanley* [1908] 2 K.B. 89; *T. R. Pratt (Bombay) Ltd. v. E. D. Sassoon & Co.* [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.

(41) *In re Sir Dinshaw Petit* [1927] 51 Bom. L.R. 447, [1927] B. 371.

cedure means only an individual person and does not include a company incorporated under the Companies Act (42).

An incorporated company is a person within the meaning of the Act of Parliament, unless the context shows that only a natural person is intended (43). A company may be "a respectable and responsible person" within the meaning of a lease (44).

The assets of a limited company, which has an independent corporate existence distinct from its members, may come under the jurisdiction of a custodian under the Administration of Evacuee Property Act, 1950, and in certain circumstances an incorporated company may be declared an evacuee under the Act (45).

See notes to ss. 12 and 34.

**90. Domicile** :—The domicile of a corporation is the place considered by law to be the centre of its affairs, which (1) in the case of a trading corporation is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on, and (2) in the case of any other corporation is the place where its functions are discharged. The registration of the company is not for all purposes of itself decisive. The question in each case is where is it that the real business of the company is carried on? According to the answer to that question, the company's domicile must in the main be determined. The domicile of a corporation is therefore the place where "the brain which controls the operations of the company is situate" (46). "A joint-stock company resides", observed Kelly, C.B., "where its place of incorporation is, where the meetings of the whole company or those who represent it are held and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the articles of association" (47). In a recent case it has however been held in England by Macnaghten J. that a limited company is capable of having a domicile and its domicil is the place of its registration and that domicil clings to it throughout its existence (48). An insurance company whose registered office was in Scotland and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the High Court in England, issued a policy through an agent within that jurisdiction to whom the premiums were paid. The company having refused to pay a claim on the policy, it was *held* that the company was not domiciled or ordinarily resident within the jurisdiction; the head office was the place where the company was resident or domiciled (49). Where a company was registered in England and the register of members was kept at the office there, it was *held* that the domicil of the company was in England, though the whole administration of the business of the company was conducted by directors domiciled and resident in Holland (50). "The domicil of a trading corporation is its principal place of business", that is, the place where the administrative business of the corporation is carried on (51).

A finding that a company is resident of more than one country (for income-tax purposes) ought not to be made unless the control of its general affairs is not centred in one country, but it is divided or distributed among two or more countries. One

(42) *Associated Pictures Ltd. v. National Studios, Ltd.* [1951] Punj. 447.

(43) *Hirst v. West Riding &c. Co.* [1901] 2 K.B. 560. See the General Clauses Act X of 1897, s. 339.

(44) *Ideal Film Renting Co. v. Neilson* [1921] 1 Ch. 575; *Wilmott v. London Road Car Co.* [1910] 2 Cr. 525.

(45) *Asiatic Engineering Co. v. Achhru Ram* (1951) A. 576 (F.B.).

(46) *Travancore National & Quilon Bank* [1939] M. 318. See also *Tulika v. Parry & Co.* [1903] 27 Mad. 315 and the authorities cited there.

(47) Quoted in *Tulika v. Parry & Co.* (supra).

(48) *Gasque v. Commissioner of Inland Revenue* [1940] 2 K.B. 80.

(49) *Jones v. Scottish Insurance Co.* [1886] 17 Q.B.D. 421.

(50) *Baelz v. Public Trustee* [1926] Ch. 863.

(51) *Dicey's Conflict of Laws*, Rule 19 (2nd ed., p. 162).

factor to be looked for is the existence in the place claimed as a place of residence of some part of the superior or directing authority by means of which the affairs of the company are controlled (52).

Although a company duly created in one State is recognized as a corporation by other States, the transaction of that company are governed not by the law of the State creating it, but by the law of the place where those transactions occur and by the constitution of the company. The capacity of a company to acquire rights and incur obligations is limited by the object to attain which it is created, and these limits must be regarded whenever and wherever the extent of the corporate powers has to be judicially decided (53).

See notes to s. 10 *post*.

**91. Suits by or against a company:**—Though generally nothing connected with the internal disputes between shareholders is to be made the subject matter of an action by some one shareholder on behalf of himself and others, yet shareholders, are entitled to bring an action, (1) in respect of matters which are *ultra vires* the company and which the majority of shareholders were incompetent to sanction; (2) where the act complained of constitutes a fraud on the minority; and (3) where the action of the majority is illegal. Further where a special resolution is improperly passed, it would be open to a shareholder to maintain a suit in respect of such illegality (54).

In order to redress a wrong done to a company or to recover moneys or damages by the company, the action should be brought by the company itself (55), except where the persons against whom the relief is sought themselves hold and control the majority of the shares and will not permit an action to be brought in the name of the company (56). In that case the Court allows the shareholders complaining to bring an action in their own names (57). But this indulgence is confined to those cases in which the acts complained of are of a fraudulent character or *ultra vires* (58). It is not necessary, as a matter of law, formally to ascertain the views of the majority before proceeding, but nevertheless, if no reason is given for the corporation not being consulted before litigation is undertaken, it must be clearly alleged and made to appear that the transaction is fraudulent or *ultra vires*, or the majority have abused their powers and are depriving the minority of their rights (59). No mere informality which can be remedied by the majority will entitle the minority to sue, if the act, when done regularly, would be within the powers of the company. "Where fraud is alleged", observed by Marten, C. J., "and where consequently it is alleged

(52) *Union Corpn. Ltd. v. Inland Revenue Comrs.* [1952] 1 A.E.R. 646 (C.A.) adopting the test laid down by Lordburn L.C. in *De Beers C. Mines v. Howe* [1906] A.C. 458.

(53) *Sabaratnam v. O. I. Travancore N. & Q. Bank* [1943] M. 111, 55 M.L.W. 653.

(54) *Nagappa v. Madras Race Club* [1949] 1 M.L.J. 662, [1949] Mad. 808, 62 M.L.J. 341; see also *Foss v. Harbottle*, *infra*.

(55) *Gray v. Lewis* [1873] 8 Cr. App. 1035; *Russel v. Wakefield Co.* [1875] 20 Eq. 474 (479); *Duckett v. Gover* [1877] 6 Ch. D 82; *Burland v. Earle* (*infra*); *Bhajeekar v. Shinkar* [1934] B. 243, 36 Bom. L.R. 483, 151 I.C. 1082; *Dhakeswari Cotton Mills v. Nilkamal* [1938] Cal. 90, [1937] C. 645, 41 C.W.N. 137; see notes to s. 23.

(56) *Dhakeswari Cotton Mills v. Nilkamal* (*supra*).

(57) *Ghandy v. Pugh* [1923] 28 C.W.N. 479; *Baillie v. Oriental Telephone & Co.* [1915] 1 Ch. 503; see also *Cockburn v. Newbridge Laundry Co.* [1915] 1 1r. L.R. 237 (C.A.); *Cook v. Deeks* [1916] 1 A.C. 554.

(58) *Burland v. Earle* [1902] A.C. 83; *North West Transportation Co. v. Beatty* [1887] 12 App. Cas. 589; *Monier v. Hooper's Telegraph Works* [1874] 9 Ch. App. 350; *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56; *Vadilal v. Maneklal* [1925] 27 Bom. L.R. 48, 49 Bom. 291, [1925] B. 188; *Dhakeswari Cotton Mills v. Nilkamal* (*supra*); see notes to s. 34.

(59) *Dhakeswari Cotton Mills v. Nilkamal* (*supra*).

that the suit is one of the recognized exceptions to the principles laid down in *Foss v. Harbottle* (60), it will, I think, generally be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether action of the majority can in fact bind the minority. This is because until the facts are ascertained with some directness, it is difficult to say what is the precise action of the majority and whether it only amounts on the one hand to those matters of internal management where the majority of the shareholders can rightly impose their will upon the minority, or whether on the other hand it is one of those cases in which the assets of the company are being improperly distributed by an attempt to pay them into the pockets of the majority of shareholders of the company or their friends at the expense of the minority" (61). See notes to s. 34.

It is the cardinal rule of corporation law that *prima facie* a majority of its members is entitled to exercise the powers of the corporation and where no special provision is made, the whole are bound, not only by the major part, but by the major part of those present at a regular corporate meeting whether the number present be a majority of the whole or not. This rule is equally applicable to a company under the present Act, save so far as its constitution or articles of association, or the Act itself, exclude or modify it (62). Even where a minority of shareholders are alleged to have been over-borne by the vote of the majority, the former cannot complain of acts which are valid if done with the approval of the majority or are capable of being confirmed by the majority, mere irregularity or informality which can be remedied by the majority being insufficient (63). Generally speaking, a person cannot charge a majority with wrong in adding to the voting power of the directors. There is nothing inherently wrong in that. A majority can increase its own majority, unless there is an element of expropriation or coercion (64).

In the case of a representative suit by a minority shareholders, normally the company should be added as defendant (65).

**92. Remedy in cases of fraud upon minority :—**In cases of "fraud upon the minority", if the wrong-doers have the balance of power, and therefore the company does not take action, there are two courses open : 'The minority may take the risk and boldly use the company's name. The other course, which is the better course where the wrongful act is supported by the majority, is for the minority shareholders to sue in their own names, or, as a matter of convenience, for a shareholder to sue on behalf of himself and all other shareholders. If however the wrong-doers are also shareholders, these shareholders, as a matter of course, must be excluded from the category of the plaintiff : hence the phrase "except those who are defendants" (66)

See s. 235 *et seq.* and Chapter VI of Part VI *post*.

**93. Pleadings and parties :** In such cases the primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to trace the dominance of the majority and the effectuation of the fraud through that dominance. Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties (66).

(60) *Foss v. Harbottle* [1843] 2 Ha. 461.

(61) *Vadilal v. Manecklal* (supra) at p. 299.

(62) *Ganesh Flour Mills Co. v. Jag Mohan* [1942] I. 68, 44 P.L.R. 15, 199 I.C. 387.

(63) *Bhajeckar v. Shinker* (supra) following *Foss v. Harbottle* (supra).

(64) *Jhajharia Brothers, Ltd. v. Sholapur Spinning & Weaving Co.* [1941] 1 Cal. 30, 72 C.L.J. 458, [1941] C. 174.

(65) *Ram Kissendas v. Satva Charan* [1950] P.C. 81.

(66) *Jhajharia Brothers, Ltd. v. Sholapur Spinning & Weaving Co.*, supra.



If the name of the company has been wrongly used as plaintiff, it may be struck out as plaintiff (67).

A bill by a member of a company on behalf of himself and all other members except the defendants, praying that a transaction in which the defendants had been the actors but which had been sanctioned unanimously at a meeting of the company, might be declared void, was sustained, although some of the members on whose behalf the bill was filed had been present and voted at the meeting (68). As regards admissibility of professional communication in such suits, see *Gourand v. Edison G. B. Telephone Co.* [1888] 59 L.T. 813.

Where an action is brought by shareholders, the plaintiffs should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity. Mere irregularities committed by the directors cannot give a cause of action to shareholders to entitle them to challenge the validity of the resolutions passed, and the aggrieved shareholder must appeal to the company. The supremacy of the majority of shareholders is subject to certain exceptions, viz., (1) where the act complained of is *ultra vires* the company, (2) where the act complained of is a fraud on the minority and (3) where there is absolute necessity to waive the rule in order that there may not be a denial of justice (69). See notes to s. 36.

**94. Appearance:--**A litigant will be allowed to appear in a suit or proceeding in person but a company must appear by an attorney who can instruct counsel on its behalf (70). In the last cited case the chairman of the company was not allowed to appear for the company, for a recognised agent as such has no right of audience (71). A director holding a power of attorney authorising him "to appear for and on behalf of the company, to conduct and represent the company in the proceedings &c." claimed the right of audience on behalf of the company: *held* that he had no right of audience (72). In a very recent case the House of Lords has authoritatively laid down that a corporation cannot be heard otherwise than by counsel (73). "In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf" (74).

A solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so or under an erroneous assumption as to the authority does so at his peril, and the action is not properly constituted. In that sense it is a nullity and can be stayed at any time provided the aggrieved defendant does not unduly delay his application. It is however open to the purported plaintiff to ratify the act of the solicitor, to adopt the proceedings and to instruct him to continue them (75). In the last cited case the company, after the proceedings had been started in its name, went into liquidation, and the liquidator adopted the proceedings on behalf of the company.

**95. Interference by Court:--**The Court does not interfere for the purpose of forcing companies to conduct their business according to the strict rules, where the irregularity complained of could be set right at any moment (76). In the last cited

(67) *Atwool v. Merryweather* [1876] L.R. 5 Eq. 464n. (188n); *Pender v. Lushington* [1877] 6 Ch. D. 70; *Oystermouth Ry &c. Co. v. Morris* [1876] W.N. 129, 192.

(68) *Preston v. Grand Collier Dock Co.* [1840] 11 Sim. 327.

(69) *Bhajekar v. Shinkar* (supra), following *Foss v. Harbottle*, supra.

(70) *London County Council* [1897] 13 T.L.R. 254.

(71) *Harchand v. B. N. Ry. Co.* [1914] 19 C.W.N. 64.

(72) *Eastern Tavoy Minerals Corp'n.* [1933] 61 Cal. 324.

(73) *Tritonia, Ltd. v. Equity & Law Life Assurance Society* [1943] A.C. 584.

(74) *Ibid* at p. 586.

(75) *Danish Mercantile Co. v. Beaumont* [1951] 1 A.E.R. 925 (C.A.).

(76) *Bhajekar v. Shinkar* (supra) following *Foss v. Harbottle* (supra).

case the suit was a sequel to a resolution passed by the board and an extraordinary resolution passed in a general meeting and confirmed as a special resolution. In pursuance of the last two resolutions an agreement was executed by another company the effect of which was to appoint the latter as managing agent of the former company. The plaintiffs who were some of the directors brought this suit for challenging the said resolution and the respective meetings in which they were passed and for a declaration that the said resolutions were invalid and for an injunction restraining the latter company from action on the agreement. The Court will not interfere with the internal management of a company acting within its powers, and in fact has no jurisdiction to do so. In order to redress a wrong done to a company or to recover money by way of damages alleged to be due to a company, the action should *prima facie* be brought by the company itself. (77).

**96. Who ought to be plaintiff:—**The above are the general rules strictly adhered to, but there may be exceptions where justice of the case requires it (78). But in a case where the company ought to be the plaintiff, the shareholder must exhaust all reasonable means to get the suit instituted by the company, before he brings the suit himself (79). In a case in which the ground of action is the fraud of the majority, it is not necessary that a meeting of shareholders should first be called (80).

The company being an artificial person, ordinarily it is the majority of shareholders who have the right to act at a meeting of the company, and they or one or more of them representing such majority can bring a suit in the name of the company (81). But where the articles provide for a human agency (e.g., the directors of the company) to act on behalf of the company, it is only such agency as can file a suit in the company's name. If for personal reasons such human agency refuses or is unwilling or unable to do an act for the company, or by reason of its own act has disabled itself from so acting, a majority of shareholders, as aforesaid, can bring a suit in the name of the company (81).

Ordinarily the directors of a company are the only persons who can conduct litigation in the company's name, but when they are themselves the wrong-doers against the company and have acted *mala fide* or beyond their powers and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of shareholders must in such a case be entitled to take steps to redress the wrong. If there is no provision in the articles of association to meet the contingency, the majority of shareholders can sue in the name of the company (82).

If a wrongful act, which affects the right or interest of the company, is done, it is the company which can bring a suit for its redress (81). To get redress for a wrong done to the company, the individual shareholders can sue in their own names only if a majority of shares are controlled by those against whom relief is sought and (a) the act complained of is *ultra vires* of the company, or (b) the majority cannot in law bind the minority or (c) the act is fraudulent having the effect of depriving the company of the property or affecting its financial resources (81). See the notes against

(77) *Satyavart v. Arya Samaj* [1946] 48 Bom. L.R. 341.

(78) *Russel v. Wakefield Co.* [1875] 20 Eq. 474.

(79) *Morris v. Morris* [1877] W.N. 6; *Lloyd-Owen v. Bull* [1936] P.C. 322 (323). See *MacDougall v. Gardiner* (infra); *Pender v. Lushington* (infra); *Harben v. Phillips* [1882] 23 Ch. D. 14; *Imperial Hydropathic Co. v. Hampson* [1883] 23 Ch. D. 1.

(80) *Mason v. Harris* [1897] 11 Ch. D. 97.

(81) *Rameshwara v. Satya Charan* [1948] 52 C.W.N. 188. In this case Mr. Justice R. C. Mitter has reviewed the relevant English authorities.

(82) *Satya Charan v. Rameshwar* [1950] F.C. 133, [1949] F.C.R. 673, 1950 S.C.J. 123.

"*Ultra vires*" *infra* and notes to s. 34, under the heading "Suit by or against a company."

In a case of urgency the intending plaintiff may sue in the company's name, but at his peril. In such an action the Court may give interlocutory relief taking care that a general meeting be called as early as possible to determine whether the action has really the support of the majority (83). If it appears that the company's name has been used improperly, the suit will be struck out (84), and either the solicitor (85) or the person who instructed him (86), will have to pay the company's costs as between party and party (87).

A single shareholder may sue the company to enforce any individual right of his own, e.g., his right to have his vote recorded (88), or his right as a director to restrain his co-directors from excluding him from the board (89). But where a wrong done is confined to one shareholder only, other shareholders on behalf of themselves and others, cannot maintain an action for that wrong (90). "In a case of individual wrong" observed Jessel, M. R., "another shareholder cannot, on behalf of himself and others, not being the individual to whom wrong is done, maintain an action for the wrong" (91). Where a suit was brought by the managing director in respect of an individual wrong, it was maintainable (92).

When the company is in liquidation, the only persons to whom the Court has any jurisdiction to give leave to use the company's name are the creditors and the contributories (93).

As soon as the company goes into liquidation, "the minority shareholders are no longer at the mercy of the majority retaining the property of the company by the strength of their votes. If the liquidator, acting at the behest of the majority, refuses, when requested, to take action in the name of the company against them, it is open to any contributory to apply to the Court" and under s. 518, "it is open to the Court on cause shown, either to direct the liquidator to proceed in the company's name, or on proper terms as to indemnity and otherwise to give to the applicant leave to use the company's name as plaintiff in any action necessary to be brought for the vindication of the company's rights. Nor is the contributory confined to that form of procedure. It would be open to him, so far as the directors are concerned, without leave from any one and by motion or summons in the winding up jurisdiction himself to bring the directors before the Court and obtain relief on the company's account" (94).

**97. Suit by secretary :—**Where a chief officer of the company had power under its articles of association to appoint a secretary for the purposes of management of the affairs of the company and he gave to the secretary, so appointed, the power for filing and defending suits for and on behalf of the company, a suit filed by the secretary as such was properly instituted (95).

(83) *East Pant &c. Co. v. Merryweather* [1864] 2 H. & M. 354.

(84) *Silber Light Co. v. Silber* [1879] 12 Ch. D. 717.

(85) *Newbiggin Gas Co. v. Armstrong* [1879] 13 Ch. D. 310; *Fricker v. Van Grutten* [1896] 2 Ch. 649.

(86) *Compagnie de Mavville v. Whitley* [1896] 1 Ch. 788, 804.

(87) *Gold Reefs of W. Australia v. Dawson* [1897] 1 Ch. 115.

(88) *Pender v. Lushington* [1877] 6 Ch. D. 70; *Srinivasan v. Subramania* [1932] M. 100.

(89) *Pulbrook v. Richmond & Co.* [1878] 9 Ch. D. 610; *Harben v. Philips* (*supra*).

(90) *Viswanathan v. Tiffin's B. A. & Paints Ltd.* [1953] M. 520, [1953] 1 M.L.J. 346.

(91) *Pulbrook v. Richmond &c. Co.*, *supra*.

(92) *Rathnavelusami v. Manickavelu* [1951] M. 542.

(93) *Cape Breton Co. v. Fenn* [1881] 17 Ch. D. 198.

(94) *Lloyd-Owen v. Bull* [1936] P.C. 322 (323).

(95) *General Relief Assn. v. Ganpat Ram* [1937] L. 751.

**97A. Order 6, r. 14, C. P. C. :—**In a suit filed by a company, for proving that the plaint has been duly signed as required by Or. 6, r. 14, C. P. Code, the plaint should state that the person who actually signed it was duly authorised to do so (96).

**98. Order 29, C. P. C. :—**In a suit by or against a company, for subscription and verification of pleadings, for service on the company and for the Court's power to require personal attendance of officers of the company, see Order XXIX of the Code of Civil Procedure, Act V of 1908.

**98A. Valuation :—**A suit was instituted by a company by its newly-elected President of the board of directors and a majority of the directors against the first defendant who was the President of the board and a minority of the directors who supported the latter, for (a) a declaration that the first defendant's office as President had validly been terminated at a meeting of the board held on 14th November, 1953 and that the second plaintiff had duly been appointed President, and (b) for an injunction restraining the defendants from interfering with the second plaintiff functioning as President of the board: Held that the valuation of the reliefs in the sum of Rs. 100 made by the plaintiffs for the purposes of court fee and jurisdiction under s. 7 (iv) (c) of the Court-fees Act was correct, and the second plaintiff was entitled to the reliefs claimed by him even without impleading the first plaintiff (the company). It was only as a matter of abundant caution that the first plaintiff was impleaded (97).

**99. Costs :—**Where one of the parties to a proceeding under s. 145 of the Code of Criminal Procedure, 1898 consisted of some managers of a limited company which was the real contestant and costs were awarded to the successful party, such costs could be realized either from the managers or from the company (98).

See notes to s. 34 *post*.

**100. Ultra vires acts :—**Where a dissentient minority seek redress against the action of the majority, the former must show that the action of the majority is *ultra vires* or that the majority have abused the powers and are depriving the minority of their rights (99).

If an act, not *ultra vires* the corporation and which, therefore, might be done with the approval of a minority, be done irregularly and without such approval, then the majority are the only persons who can complain (1), and the Court will not entertain the complaint except at the instance of the majority and in a proceeding in which the corporation is the plaintiff (2).

A single shareholder suing on behalf of himself and others or suing alone (3), may make the company a defendant and may restrain the company and the directors from doing an act which is illegal (4), or criminal (5), or *ultra vires* the corporation which the majority are consequently incompetent to affirm (6). "If one individual

(96) Madanlal v. Union of India [1955] Bhop. 18.

(97) Srinivasachariar v. Srirangam J. Bank [1955] N.U.C. 84.

(98) Udhab v. Sidheswar [1937] Pat. 559.

(99) Dominion Cotton Mills Co. v. Amyot [1912] A.C. 546; Dhakeswari Cotton Mills v. Nilkamal [1938] 1 Cal. 90, 41 C.W.N. 1137, [1938] C. 645.

(1) Foss v. Harbottle 1843] 2 Hare 461; MacDougall v. Gardiner [1875] 1 Ch. D. 13; Burland v. Earle 1902] A.C. 83; see also Foster v. Foster [1916] 1 Ch. 532.

(2) Mozley v. Alston [1847] 1 Ph. 790; MacDougall v. Gardiner (supra).

(3) Simpson v. Westminster Hotel Co. [1860] 8 H.L.C 712; Russel v. Wakefield Co. (supra); Hoole v. Great Western Ry Co. [1867] 3 Ch. App. 262; Howden v. Yorkshire Miner's Assn. [1903] 1 K.B. 308, 336; Dominion Cotton Mills v. Amyot (supra).

(4) Cockburn v. Newbridge Laundry Co. [1915] 1 Ir. L.R. 237 (A.C.).

(5) Powell v. Kempton Park Co. [1897] 2 Q.B. 242, 260, 268.

(6) Holmes v. Newcastle &c. Co. [1875] 1 Ch. D. 682; Hope v. International F. Society [1876] 4 Ch. D. 327.

having an interest complains of an act of the whole company or the executive of the whole company as being illegal, there is, as a general rule, no necessity for any other shareholders being present" (7).

A stranger having sustained no special damage cannot sue the company (8), nor a shareholder who has with knowledge recovered and retains part of the proceeds of the *ultra vires* act (9), except to restrain future *ultra vires* dealings (10).

If the act complained of is not *ultra vires*, but is of a fraudulent character or in the nature of a wrong done to the company, and the wrong-doers are in the majority, then a single shareholder may bring the action on behalf of himself and others (11), making one of the majority a party defendant (12).

See notes to ss. 13 and 34.

**101. Matters *ultra vires* and *intra vires* :—**Where there is no suggestion of fraud, the company is bound in a matter *intra vires* by the unanimous agreement of its members, even at a directors' meeting where all the members were present (13). But where the matter is *ultra vires*, it is otherwise, as held by Lord Justice Lindley : Individual assents given separately may preclude those who give them from complaining of what they have sanctioned ; but for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting (14).

**102. Notice :—**Outsiders are bound to know the "external position of the company" (15) ; but they have a right to assume that all matters of internal management have been complied with (16). For fuller exposition of the principle see notes to ss. 26 and 34. Persons dealing with a company are deemed to have notice of its registered documents (17). A limited company can speak and act only through agents duly authorized in that behalf in accordance with its constitution, and if such company by special resolution authorizes any body of officers to draw cheques, sign, accept or endorse bills of exchange, promissory notes, cheques, orders of payment or other commercial papers, and such resolution has been communicated to the bank with which the company deals, the bank will be liable if it does not act in accordance with that resolution, even if it is misled by the fraudulent misrepresentation of an officer of the company who on previous occasions has dealt with the bank as an officer of the company ; the bank is bound to be vigilant (18).

**103. Knowledge :—**If it is established by evidence that the duty of investigating and ascertaining facts has been delegated in the ordinary course of a company's business to a subordinate official, the company will in law be bound by his knowledge in the same way as it is affected by the knowledge of the board of directors. "It

(7) *Per Sir John Holt, L. J.* in *Hoole v. Great Western Ry. Co.* [1868] 3 Ch. App. 262, 17 L.T. 153 ; see also *Srinivassam v. Subramania* [1932] M. 100 and *Cotton v. National Union of Seamen* [1929] 2 Ch. 58.

(8) *Towers v. African Tug Co.* [1904] 1 Ch. 558, 571.

(9) *Towers v. African Tug Co.* (supra).

(10) *Moseley v. Koffyfontein Mines* [1911] 1 Ch. 73.

(11) *Russel v. Wakefield Co.* (supra) ; *Alexander v. Automatic Telephone Co.* (supra) ; *Burland v. Earle* (supra).

(12) *Northern Assurance Ltd. v. Furnham United Breweries Ltd.* [1912] 2 Ch. 125.

(13) *Express Engineering Works* [1920] 1 Ch. 466 (C.A.) ; see also *Parker & Cooper Ltd. v. Reading* [1926] Ch. 975.

(14) *George Newman & Co.* [1895] 1 Ch. 674, 686, per Lindley L. J.

(15) *Mahony v. East Holyford Mining Co.* [1875] 7 H.L. 860, 893.

(16) *Royal British Bank v. Turquand* [1856] 6 E. & B. 327 ; *Montreal Co. v. Robert* [1906] A.C. 196, 202.

(17) *Ernest v. Nicholls* [1857] 6 H.L.C. 401.

(18) *Bank of Montreal v. Dominion G. G. & Casualty Co.* [1930] P.C. 278, 60 M.L.J. 149, 128 I.C. 669.

is true that in the *Houghton's case*, [1928 A.C. 1, 18] Lord Sumner points out that 'the mind, so to speak, of a company is not reached or affected by information merely possessed by its clerk.' And again, 'the knowledge which is relevant is that of directors themselves, since it is their board that deals with company's rights.' But it must depend upon the facts of each case, where the matter is not especially determined by the articles, by what particular means of information and in what circumstances a company may properly be said to acquire knowledge, or have knowledge thrust upon them" (19).

In *Newsholme Bros. v. Road Transport & General Insurance Co.* [(1929) 2 K. B. 356 (374)] Scrutton L. J., quoting Lord Sumner says: "The knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, is not to be imputed to a company to whom from the hypothesis he would be very unlikely to disclose it in fact."

Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company, unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud or even irregularity, the Court will not draw the inference that he has fulfilled those duties (20).

As to the knowledge of directors see notes to s. 252 *post*.

**104 Acquiescence and estoppel** :—As regards acquiescence and estoppel, the position of a company seems to be somewhat different from that of an individual. "In the case of a natural person if information is intelligibly conveyed to and received by him its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With the artificial incorporated person, it must be necessarily otherwise, for an incorporated company cannot read or hear, except by the eyes and ears of others who are to be the organs by which it receives knowledge so as to affect its right" (21). In the last cited case Lord Dunedin observed as follows. "There can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. The knowledge of a mere official like the secretary would only be the knowledge of the company, if the thing of which knowledge is predicated was the thing within the ordinary domain of the secretary's duties. But what, if the knowledge of the directors is knowledge of a director, who is himself *particeps criminis*, that is, if the knowledge of an infringement of the rights of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer, but authority is not wanting" (22). Then he cites the cases noted below (23). Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies. Neglect of duty does not cease by repetition to be neglect of duty, and if there be any doctrine of "lulling to sleep," it must depend upon and can only be another way of expressing estoppel or ratification (24). "A limited company," observed Lord Tomlin, "can-

(19) *Evans v. Employers' Mutual Insurance Association* [1936] 1 K.B. 505 (C.A.), per Slessor, L.J. at p. 517.

(20) *T. R. Pratt (Bombay) Ltd.* [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.

(21) *Per Lord Sumner in Houghton & Co. v. Nothard, Low and Wills Ltd.* [1928] A.C. 1 at pp. 19, 20.

(22) *Ibid* at pp. 13-14.

(23) *Hampshire Land Co.* [1896] 2 Ch. 743, 749; *Lacey v. Hill* [1876] 4 Ch. D. 537.

(24) *Bank of Montreal v. Dominion G. G. & Casualty Co.* (*supra*).

not have a view except so far as the views of the agents by which it acts are to be deemed the views of the company" (25).

**105. Remedy for offences by or against a company :**—A company is a legal entity, and where a duty is imposed upon it in statute the breach of which is made an offence, unless there is anything to the contrary expressed or implied in the statute, a company can be convicted of the offence and sentenced to pay a fine (26). But an indictment will not lie against a corporation either for a felony or for misdemeanor involving personal violence (27). A corporation may however be indicted for a misfeasance, e.g., for cutting through and obstructing a highway (28). An action for malicious prosecution will lie against a corporation (29). Trespass lies against a corporation for an act done by its agent within the scope its authority (30). An injunction was granted against a company from committing an act of nuisance, e.g., keeping a stable for horses (31). For a contempt of Court the Court cannot make an order of attachment, but it can order the company to pay a fine (32). A Company may be fined for contempt of Court (33); but it cannot be convicted under a section which inflicts imprisonment or whipping only as punishment (34), nor can it be committed for trial on an indictment (35). A company in liquidation, as distinct from individual liquidator, is incapable of committing an act of maintenance (36).

Whether the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the company employing him, depends upon the nature of the charge, the relative position of the officer or agent and other relevant facts and circumstances (37). A company can be convicted of an offence, if it has by the only people who could act or speak or think for it, made a return with intent to deceive, or made a statement which it knew to be false in a material particular (38). In the last cited case the trial Judges were of opinion that the company could not in law be guilty of the offence charged, since there was implicit in those offences an act or will or state of mind which could not be imputed to a body corporate. But their Lordships (Viscount Caldecote Lord Chief Justice and Macnaghten and Hallett, JJ.) held that the trial Judges were wrong and that the company could be convicted of the offence against Regulation 82 of the Defence (General) Regulations, 1939; Motor Fuel Rationing (No. 3) Order, 1941, either in writing or by word of mouth unless such statement relates to the company

**106. Libel or defamation :**—A limited company can maintain an action for libel or defamation where it has been made in respect of its business (39). Although it is not actionable to publish any defamatory statement about a limited company,

(25) *Peat v. Gresham Trust, Ltd.* [1934] 151 L.T. 63 (H.L.) at p. 65.

(26) *Rangoon Electric Tramway & Supply Co. v. King-Emp.* [1933] 11 Rang. 162.

(27) *King v. Cory Brothers* [1927] 1 K.B. 810.

(28) *Queen v. Great North of England Ry. Co.* [1846] 9 Q.B. 315.

(29) *Edwards v. Midford Ry. Co.* [1880] 6 Q.B.D. 287; *Cornford v. Carlton Bank* [1899] 1 Q.B. 392.

(30) *Maud v. Monmouthshire Canal Co.* [1842] 4 Man. & G.R. 452.

(31) *Raiper v. London Tramways Co.* [1893] 69 L.T. 361.

(32) *King v. J. G. Hammond & Co.* [1914] 2 K.B. 866.

(33) *King v. J. G. Hammond & Co.* [1914] 2 K.B. 866; but see *contra Re Hooley* [1899] 79 L.T. 706.

(34) *Hawke v. Hutton & Co.* [1909] 2 K.B. 93.

(35) *King v. Daily Mirror Newspapers, Ltd.* [1922] 2 K.B. 530. But see *Triplex Safety Glass Co. v. Lancegaye Safety Glass (1913), Ltd.* [1939] 2 K.B. 395 (C.A.) where it has been held that a limited company may be indicated for libel.

(36) *Metropolitan Bank v. Pooley* [1885] 10 App. Cas. 210.

(37) *R. v. I. C. R. Haulage, Ltd.* [1944] All E.R. 689.

(38) *Director Public Prosecutions v. Kent & Sussex Contractors, Ltd.* [1944] 1 K.B. 146.

(39) *South Helton Coal Co. v. North Eastern News Assn.* [1894] 1 Q.B. 133; *Slazengers, Ltd. v. C. Gibbs & Co.* [1916] 33 T.L.R. 35.

in the way of its business, nevertheless if the defamatory statement does so relate, there is a cause of action without proof of special damage, whether the statement was made in writing or by word of mouth. In such a case the company's right of action is the same as that of an individual (40).

A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servants acting in the course of their employment (41). In the last cited case Lord Lindley observed: "He (the servant) had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorised still if the act is done in the course of employment which is authorised, the master is liable for the act of his servant.' This doctrine has been affirmed by this board in *Mackay Commercial Bank of New Brunswick* (42) and *Suire v. Francis* (43) and the doctrine is as applicable to incorporated companies as to individuals."

**107. CL. III "PRIVATE COMPANY"** :—This definition was substituted for the old one by the amending Act (XXII) of 1936, following the definition given in the English Act of 1929 with some modifications. Sub-s. (1) (iii) (b) (ii) is new. In England it was held in 1912 that a company whose articles contained the restrictions, limitations and prohibitions mentioned in sub-clauses (a), (b) and (c) remained a private company even though they were not complied with (44). In 1913 an amending Act was passed by which it was provided that if a private company failed to comply with any of the foregoing provisions, it ceased to be entitled to the privileges of a private company: but the Court might grant relief if the default was due to accident, inadvertence or other sufficient cause (45). This was reiterated in ss. 26 and 27 of the English Act of 1929. In the Indian Act of 1913 it was provided in sub-clause (ii) that a company which did not continue to observe the restrictions, limitations and prohibitions mentioned in sub-clause (i) would not be a private company. The Court had not been given the power to grant relief as in England. This was remedied by substituting s. 154 (s. 27 of the English Act of 1929) in the former Act for the old one. See now ss. 43 and 44 of the present Act. The position of a private company is in most respects the same as that of a public company (46). If one member practically holds all the shares, the company is still a distinct "person" (47). As to the possibility of a private company being a partnership in guise of a company, see the case noted below (48). In the undernoted case their Lordships of the Privy Council have condemned the view, too widely current, that a private company need not be regarded as a corporation distinct from the persons composing it and that irregularities in connection with its liquidation, which in the case of a public company would be most serious, are venial and perhaps even permissible. "It is necessary, in their Lordships' opinion, that this view should be once for all dispelled" (49).

(40) *D. & L. Caterers, Ltd. v. D' Ajou* [1945] 114 L.J. (K.B.) 386, 173 L.T. 21.

(41) *Citizen's Life Assurance Co. v. Brown* [1904] A.C. 423 (P.C.).

(42) [1874] L.R. 5 P.C.C. 394.

(43) [1877] 3 App. Cas. 106.

(44) *Park v. Royalties Syndicate* [1912] 1 K.B. 330.

(45) S. 1 (2) (b), Companies Act 1913 (3 & 4 Geo. V, Cap. 25).

(46) *Re White* [1913] 1 Ch. 231.

(47) *Salomon v. Salomon & Co.* [1897] A.C. 22.

(48) *Yenidje Tobacco Co.* [1916] 2 Ch. 426.

(49) *Ditcham v. Miller* [1931] P.C. 203, 134 L.C. 324.



In estimating the number of members of a private company the secretary may be but a director or managing director may not be, counted as one "in the employ" of the company (50).

**108. Transfer of shares :—**A resolution, in accordance with the articles of a private company, for compulsory sale of shares by the members at a fair value to be fixed by the directors or by the auditors is not invalid (51). In the articles of private companies provisions are sometimes made for compelling a shareholder at any time to transfer his shares to particular persons at a particular price. They are not void as being repugnant to absolute ownership or as tending to perpetuity (52). In the articles of association of a private company provisions are sometimes made to the following effect : any member desiring to sell any of his shares must notify the board of directors of the number of shares, the price and the name of the proposed transferee, and the board must offer to the other shareholders the number of shares offered at the price, and if the offer is accepted, the shares shall be transferred to the acceptors, and if the shares or any of them are not so accepted, the holder may sell or transfer them or any of them at the same or higher price to third parties approved by the board. For construction of such articles see *Ocean Coal Co. v. Powell Duffryn Steam Coal Co.* (53).

The articles of a private company provided : If a member died his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof and in so certifying the auditor shall be considered to act as an expert and not as arbitrator. : *Held*, (i) if the auditor had not given the basis of his valuation, his certificate could not be questioned, but as he has done so, the court could examine his reasons and criticise them if they were wrong—notwithstanding the provisions in the articles ; (ii) the auditor was wrong not only in making his valuation on the basis that the company was being wound up and was in urgent need of having its assets sold immediately under a forced sale, but also in failing completely to take into consideration the fact that the person who bought the share would have the right to control the business, and therefore the valuation was wrong and was not binding on the plaintiff (54). On appeal from the last cited case it has been held by the Court of Appeal that a valuation made by an auditor as an expert could be impeached not only for fraud but also mistake or miscarriage of justice, *e.g.*, if the expert made an arithmetical error or took something into account which he ought not to have done or *vice versa*, or interpreted the agreement wrongly, or proceeded on some erroneous principle ; even if the court could not point to actual error, nevertheless, if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the court would interfere (55). But on the facts bearing particularly in mind the precarious nature of the company's tenure of its premises, the Court of Appeal held that it could not be said that the auditor had erred and therefore his valuation ought not to be disturbed (55). In *Collier v. Mason* (56) Sir John Romilly, M. R. said : "This Court upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say fraudulent one ; as if the valuer had valued

(50) *Newspaper Proprietary Syndicate* [1900] 2 Ch. 349 ; *Cairney v. Back* [1906] 2 K.B. 746 ; *Normandy v. Ind. Coop & Co.* [1908] 1 Ch. 84.

(51) *Bai Rambha v. Master Silk Mills* [1955] N.U.C. 997 (Sau.).

(52) *Borland's Trustee v. Steel Bros. & Co.* [1901] 1 Ch. 279 ; *Attorney General of Ireland v. Jameson* [1904] 2 Ir. R. (K.B.D.) 644. See in this connection ss. 10 and 11 of the Transfer of Property Act IV of 1882.

(53) [1932] 1 Ch. 654.

(54) *Dean v. Prince* [1953] 2 A.E.R. 636.

(55) *Dean v. Prince* [1954] 1 A.E.R. 749 (C.A.).

(56) [1858] 25 Beav. 204.

something not included, or had valued it on a wholly erroneous principle . . . or even in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause ; in any one of these cases the Court would refuse to act on the valuation."

Where the articles of a private limited company provided that a member could not transfer his shares until he had given notice to the secretary offering to sell the shares at a price to be fixed by the auditor and until the secretary had offered them to the other members, one director having a right of pre-emption, it was held by the House of Lords that there was no effective sale of the shares, as the restrictions imposed by the articles had not been observed, and that the shareholder was not estopped from claiming rectification of the register of members, as the bankers to whom the shares had been assigned were well aware, and had been informed by the former, of all the restrictions upon the sale of the shares (57). "I do not think", observed Lord Hailsham, L. C. at p. 248 in the last cited case, "that the disregard of article 17 rendered the transaction *ultra vires* the company, or that it could not have been regularized by the assent of all the shareholders ; but that assent was never obtained."

Notwithstanding the complete failure to comply with a private company's articles of association in regard to the procedure to be followed before shares could be transferred, the purchaser thereof, having paid to the transferor the full consideration, had obtained equitable rights therein and as his rights had accrued earlier than the equitable rights of the plaintiff under a charging order for his decree against the transferor, the rights of the aforesaid transferee prevailed over the plaintiff's claim (58).

Shares in a private company are capable of equitable assignment and can therefore be the subject of a trust (59).

**109. Issuing of debentures :—**For the meaning of "debenture" see notes to cl. (12) of s. 2 *ante*. Where it is found that certain prize bonds issued by a private company and bearing the company's seal contain an acknowledgement of a debt and a promise to return it, and form a series bearing consecutive numbers, and all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest realized by the company, such bonds are debentures within the meaning of that clause (60). If such debentures are issued by a private company, it ceases to be a private company and is therefore bound to file its balance sheet and the profit and loss account with the Registrar of Companies under s. 220 (60a).

**110. Managing agent :—**No private company acting as the managing agent of any other company public or private, can itself be managed by a managing agent (see s. 325).

**111. Private company and subsidiary private company—distinction :—**In the provisions introduced by the Amending Act (XXII) of 1936 distinction was for the first time made between an ordinary private company and a private company which is subsidiary to a public company (for the definition of a subsidiary company see s. 4 *infra*).

**112 Special privileges of all private companies :—**(1) Any two or more persons may form an incorporated company with or without limited liability—s. 12 (1).

As to the consequences of carrying on business by a private company with fewer than two members, see s. 45.

(57) *Hunter v. Hunter* [1936] A.C. 222.

(58) *Hawks v. McArthur* [1951] 1 A.E.R. 22.

(59) *E. D. Sassoon & Co. v. Patch* [1943] 45 Bom. L.R. 46.

(60) *Emp. v. Iaxman* [1945] 47 Bom. L.R. 600.

(60a) *Gardner v. Iredale* [1912] 1 Ch. 700.

(2) Prohibition in s. 70 of allotment of shares or debentures in certain cases unless statement in lieu of prospectus has been delivered to the Registrar shall not apply—s. 70 (3).

(3) Restrictions contained in s. 81 relating to further issue of capital shall not apply—s. 81 (3).

(4) Provisions of ss. 114 and 115 relating to share warrants shall not apply (s. 114).

(5) Restrictions on commencement of business by a company contained in s. 149 shall not apply—s. 149 (7) (a).

(6) Provisions relating to statutory meeting and statutory report of company in s. 165 shall not apply—s. 165 (10).

(7) One or two members, as the case may be, specified in s. 179 (1) (b) present in person or proxy can demand a poll—s. 179 (1).

(8) Provision relating to the right of preference shareholders and debenture holders to receive and inspect accounts, reports, etc. contained in s. 219 shall not apply in relation to a balance-sheet of a private company laid before it before the commencement of the present Act—s. 219 (5).

(9) The requirements of sub-s. (1) of s. 220 will be satisfied if three copies of balance-sheet only (not the profit and loss account) certified by the company's auditor to be true copies together with the auditors' report in so far as it relates to the balance-sheet only are filed with the Registrar at the time as the copy of the annual return referred to in s. 160 is filed—s. 220 (1) (b).

(10) Restrictions on appointment or advertisement of director contained in s. 266 shall not apply—s. 266 (5) (b).

(11) Provision regarding removal of directors in s. 284 shall not apply to a director holding office for life on 1st April, 1952—s. 284 (1) Proviso.

**112A. Special disability of a private company :—**A member of a private company is not entitled to appoint more than one proxy to attend a general meeting on the same occasion—s. 176 (1) Proviso (b).

**112B. Special duty of a private company :—**In addition to the duty cast upon a private company by s. 161 it will have to file with the Registrar a certificate stating the matters mentioned in cl. (b) of sub-s. (2) of s. 161—s. 161 (2).

**112C. Special obligation of a private company :—**A private company limited by shares must, along with the memorandum, register its articles of association—containing the matters specified in s. 3 (1) (iii) (a), (b) and (c). In the case of any other private company the articles must contain matters contained in s. 3 (1) (iii) (b) and (c)—see s. 26 and s. 27 (3).

**113. Special privileges of a private company which is not subsidiary of a public company :—**In addition to the privileges specified in Note 112 a private company not subsidiary of a public company has under the present Act the following special privileges, namely :—

(1) Provisions of s. 77 prohibiting financial assistance for purchase of or subscription for any shares in the company or its holding company shall not apply—s. 77 (2).

(2) Provisions of ss. 85 to 89 relating to (i) preference share capital and equity share capital, (ii) new issue of share capital of two kinds only, (iii) voting rights, (iv) prohibition of issue of shares with disproportionate rights and (v) termination of disproportionately excessive voting rights in existing companies shall not apply—s. 90 (b).

(3) Provision of sub-s. (3) of s. 111 for appeal against refusal by company to register any transfer of shares or debentures shall not apply—See s. 111 (3) and (8).

(4) A private company which is not subsidiary of a public company can make provisions in its articles relating to the matters specified in ss. 171 to 186, that is

with respect to its general meetings, notice, quorum, chairman, proxies, voting, poll and power of Court to order meeting to be called; otherwise the provisions of ss. 171 to 186 shall apply—s. 170 (1). In any case, sub-s. (3) of s. 176 and s. 182 shall not apply—ss. 176 (3) and 182.

(5) Provision regarding managerial remuneration contained in s. 198 shall not apply—s. 198 (1).

(6) Provisions of s. 204 regarding restriction on appointment of a firm or body corporate to office or place of profit shall not apply—s. 204 (6).

(7) Such a company may have at least two directors—s. 252 (2).

(8) Provisions of s. 255 relating to the appointment of directors and proportion of those who are to retire by rotation shall not apply—s. 255.

(9) Provisions of s. 256 regarding retirement of directors by rotation shall not apply—s. 256.

(10) Provision of sub-s. (1) of s. 257 relating to the right of persons other than retiring directors to stand for directorship shall not apply—s. 257 (2).

(11) Provision in s. 259 regarding increase in the number of directors requiring sanction of Government shall not apply—s. 259.

(12) Provisions of s. 261 as to certain persons connected with the managing agent are not to be appointed directors, except by special resolution, shall not apply—s. 261 (1).

(13) Provision relating to the filling of casual vacancies among directors contained in s. 262 shall not apply—s. 262 (1).

(14) Provision in s. 263 of appointment of directors to be voted on individually shall not apply—s. 263.

(15) S. 264 requiring consent of candidate for directorship to be filed with the Registrar shall not apply—s. 264 (2).

(16) S. 265 providing option to company to adopt proportional representation for the appointment of directors shall not apply—s. 265.

(17) S. 268 requiring Government approval to amendment of provision relating to managing or whole time or non-rotational directors shall not apply—s. 268.

(18) S. 269 requiring Government approval to appointment of managing or whole-time director shall not apply—s. 269.

(19) S. 270 specifying time within which share qualification is to be obtained by director and the maximum amount thereof shall not apply—s. 273.

(20) S. 271 regarding filing of declaration of share qualification by director shall not apply—s. 273.

(21) S. 272 providing penalty for acting as a director after two months mentioned in s. 269 without holding the qualification shares shall not apply—s. 273.

(22) Such a company may by its articles provide for disqualification of directors on any grounds in addition to those provided in sub-s. (1) of s. 274—s. 274 (3).

(23) Such companies shall be excluded in calculating for the purposes of ss. 275 to 277 the number of companies of which a person may be a director—s. 278 (1) (a).

(24) The 65 years' age limit of a director mentioned in ss. 280 to 282 shall not apply—s. 280 (1).

(25) Such a company may by its articles provide that the office of director shall be vacated on any grounds in addition to those specified in sub-s. (1) of s. 283—s. 283 (3).

(26) The restrictions on the powers of Board provided in s. 293 shall not apply—s. 293 (1).

(27) Prohibition of granting loans to directors contained in sub-s. (1) of s. 295 shall not apply—s. 295 (2) (a).

(28) Sub-s. (1) of s. 300 prohibiting an interested director to participate or vote in Board's proceedings shall not apply—s. 300 (2).

See in this connection s. 300 (2) (b) and (c) and sub-s. (3) thereof.

(29) S. 309 relating to the determination of the remuneration of directors shall not apply—s. 309 (9).

(30) S. 310 requiring Government sanction for increasing the remuneration of a director or managing director shall not apply—s. 310.

(31) S. 311 requiring Government sanction for increase in remuneration of managing director on re-appointment or appointment after the Act, shall not apply—s. 311.

(32) S. 316 restricting the number of companies of which one person may be appointed managing director shall not apply—s. 315.

(33) S. 317 prohibiting appointment of managing director for more than five years at a time shall not apply—s. 315.

(34) Provisions of ss. 328, 329, 330 and 331 relating to term of office of managing agent, variation of managing agency agreement, term of office of existing managing agents to terminate on 15th August, 1960 and application of the Act to existing managing agents, respectively shall not apply if exempted by the Central Government—s. 327.

(35) Such a company shall be excluded in calculating the number of companies of which a person may be a managing agent in pursuance of s. 332—s. 332 (3) (a).

(36) Provision in s. 345 for approval of the Central Government for succession to managing agency by inheritance or devise shall not apply—s. 345 (2).

(37) S. 346 requiring approval of Central Government to changes in the constitution of managing agency firm or corporation shall not apply—s. 346 (1).

(38) Provisions of ss. 348 to 354 relating to remuneration of managing agent (including office allowance) shall not apply—s. 355.

(39) Provisions of s. 369 regarding prohibition of loans etc. to managing agent etc. shall not apply—s. 369 (1).

(40) Ss. 372 and 373 regarding prohibition of purchase by company of shares etc. of other companies in the same group and s. 374 providing penalty shall not apply—s. 372 (12) (b).

(41) S. 384 prohibiting the appointment of a firm, body corporate or association as manager shall not apply—s. 384.

(42) S. 386 regulating the number of companies of which a person may be appointed manager shall not apply—s. 386 (5).

(43) S. 409 relating to the Central Government's power to prevent change in the board of directors likely to affect the company prejudicially shall not apply—s. 409 (3).

(44) Provision of s. 416 relating to contracts by agents of the company in which the company is undisclosed principal shall not apply—s. 416 (1).

*N.B.*—Where default is made by a private company in complying with any of the provisions of cl. (iii) of sub-s. (1) of s. 3 in its articles, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and the Act shall apply to the company as if it were not a private company—s. 43. For remedy see Proviso to s. 43.

For obligation of a private company on ceasing to be a private company to file prospectus or statement in lieu of prospectus see s. 44.

**113A. SUB-S. (1). cl. (iii) (c), "Invitation to the public"** :—For meaning of this expression in relation to a private company, see sub-ss. (2) to (5) of s. 67 *post*.

**114. Conversion of private company into public company** :—A private company may turn itself into a public company by complying with the provisions of s. 44. Even before such conversion the position of a private company is, in most respects, similar to that of a public company. Neither the Indian Act nor the English Act of 1929 made any provision for conversion of a public company into a private

company. But in *Palmer's Company Law*, 15th ed. (1929) at p. 392 occurs the following passage (61): "Many existing public companies, which can conveniently be worked as private companies, have in like manner altered their regulations by special resolution." See ss. 29 and 30 of the English Act of 1948.

For the consequences of reduction in the number of members below two, see s. 45.

**114A. SUB-S. (2).—**Reading section 2A of the previous Act as amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 and s. 277 of the old Act mentioned in that section, a company did not become a company incorporated in India for all purposes except for the limited purpose of s. 277 of the old Act. Even if it became an Indian company for a period of six months, it could not become an Indian company for all purposes by the mere giving of notice that the address of the company's registered office had been changed from one part of the town in India to another. A notice given under s. 72 of the old Act could neither make a foreign company, nor confer on a foreign company the status of, an Indian company (62).

#### 4. Meaning of "holding company" and "subsidiary".—

(1) For the purposes of this Act, a company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,—

(a) that other controls the composition of its Board of directors ; or

(b) that other holds more than half in nominal value of its equity share capital ; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

#### *Illustration*

Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of clause (c) above ; and so on.

(2) For the purposes of sub-section (1), the composition of a company's Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships ; but for the purposes of this provision that other

(61) See also Hals. p. 73, foot-note.

(62) *Vasica v. Janda Rubber Works, Ltd.* [1950] East Punj. 188 (A.I.R.).

company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say—

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid ;

(b) that a person's appointment thereto follows necessarily from his appointment as director, managing agent, secretaries and treasurers, or manager of, or to any other office or employment in, that other company ; or

(c) that the directorship is held by that other company itself or by a subsidiary of it.

(3) In determining whether one company is a subsidiary of another—

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it ;

(b) subject to the provisions of clauses (c) and (d), any shares held or power exercisable—

(i) by any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity) ; or

(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity ;

shall be treated as held or exercisable by that other company ;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded ;

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary [not being held or exercisable as mentioned in clause (c)] shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be the holding company of another if, but only if, that other is its subsidiary.

(5) In this section, the expression "company" includes any body corporate, and the expression "equity share capital" has the same meaning as in sub-section (2) of section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

**114B.** "We have entirely recast the definitions of subsidiary and holding companies and replaced the existing definitions in section 2 of the Act by the provisions of section 154 of the English Companies Act, 1948. The effect of this new-definition would be that company A would be deemed to be a subsidiary of company B, if one of the following conditions applies: (i) company B is both a member of company A and controls the composition of the board of directors or (ii) company B holds more than half of A's equity share capital in nominal value, or (iii) company A is a subsidiary of any subsidiary of company B. As a corollary, a company is defined as a holding company of another, when that other company fulfills the above conditions so as to make it a subsidiary of the first. It will be noted that a company under the new definition, may be a subsidiary of another even though it is not a company within the meaning of the Act"—*C. L. C. R., para 27.*

"The illustration has been added so as to bring out clearly the intention underlying sub-clause (1) (c). A few minor drafting improvements have also been effected—*Notes on Clauses.*

In cl. (b) of sub-s. (2) the words "secretaries and treasurers" have been added by the Joint Committee.

**SUB-S. (5) :-** For the definition of "equity share capital", see s. 85 (2).

**SUB-S. (6) :-** This sub-section introduced by the Lok Sabha deals with foreign body corporates.

**114C. Subsidiary company :-** The word "nominee" is a commercial rather than a legal expression. It denotes the absence of beneficial ownership or interest (63).

**115. Income-tax on subsidiary & holding companies :-** Where on the winding up of certain subsidiary companies their assets and undertakings were transferred to the holding company, the latter was properly assessed to income-tax as a successor to that part of its trade previously carried on by the subsidiary companies (64).

**116. Controlling interest :-** The words "controlling interest" in para 7 (b) of Sch. IV to the English Finance Act, 1937 include not only direct control by the company which it is sought to tax, but also an indirect controlling interest in another company which itself holds a controlling interest in the company not liable to be

(63) Buckley, 11th ed., pp. 287-88.

(64) Briton Ferry Steel Co. v. Barry [1940] K.B. 463.



assessed to the national defence contribution (65). The holding of a bare majority of voting power in a company is in general sufficient to constitute a "controlling interest", and it is not necessary to hold such a proportion of the shares as would secure the passing of a resolution for which a special majority is required (65).

**5. Meaning of "officer who is in default".**—For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means any officer of the company who is knowingly guilty of the default, non-compliance, failure, refusal or contravention mentioned in that provision, or who knowingly and wilfully authorises or permits such default, non-compliance, failure, refusal or contravention.

This provision is new. It is based on s. 440 (2) of the English Act of 1948. The language however has been amplified so as to cover all cases which are intended to be included. For instance, a person who is himself guilty of the default, failure etc., although he cannot be said to authorise or permit the default or failure is obviously intended to be within the scope of this provision—*Notes on Clauses*.

The Joint Committee has inserted the words "and wilfully" between "knowingly" and "authorises."

**116A. Wilful default :—**"An act or omission to do an act is wilful where the person, of whom we are speaking, knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative, unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty" (66). If the neglect or default arises from the voluntary acts of the parties, either awake or asleep, with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, the neglect or default is wilful (67).

**6. Meaning of 'relative'.**—Two persons shall be deemed to be 'relatives' if, and only if, they are husband and wife, or the one or the spouse of the one is related to the other or the spouse of the other, whether by legitimate or illegitimate descent or by adoption and whether by full blood or by half blood, in any of the following ways, namely :—

- (i) as parent and child ;
- (ii) as grand-parent and grand-child ;
- (iii) as brothers or sisters, or as brother and sister ;

(65) *British American Tobacco Co. v. Inland Revenue Commissioners* [1943] A.C. 235.

(66) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407 per Romer J. This view was affirmed by the Court of Appeal consisting of Pollock M. R., Warrington & Sargant, L. JJ.

(67) *Elliot v. Turner* [1843] 13 Sim. 477 at p. 485.

(iv) as uncle or aunt, and nephew or niece ;

(v) as first cousins, that is to say, as persons having a common grand-parent, provided the cousins are members of a Hindu Joint family whether governed by the Mitakshara, the Dayabagha, the Marumakkhathayam, the Aliyasanthana or any other system of law.

This new section has been inserted by the Joint Committee with the following observation :—"As the expression 'relative' occurs not only in Schedule VII but also in the definition of 'associate' the definition of 'relative' in Schedule VII has been included in the body of the Bill, and omitted from the Schedule" (*vide* J.C.R., para 11).

In cl. (v) the words after "grand-parent" have been inserted by the Lok Sabha making it clear that the first cousins must be members of a Hindu Joint family.

**7. Interpretation of "person in accordance with whose directions or instructions directors are accustomed to act".**—Except where this Act expressly provides otherwise, a person shall not be deemed to be, within the meaning of any provision in this Act, a person in accordance with whose directions or instructions the Board of directors of a company is accustomed to act, by reason only that the Board acts on advice given by him in a professional capacity.

**116B.**—This provision is new. It is based on s. 455 (2) of the English Act of 1948. "Unless this immunity is given to professional advisers like solicitors and auditors, it will be difficult for them to carry on their professional work. In several sections of the Act [cf. our redraft of s. 86D (see now s. 369)] we have recommended that certain prohibitions or restrictions should be imposed on directors and managing agents and on those persons in accordance with whose directions and instructions they are accustomed to act, and that the penalties which we have proposed for directors and managing agents who contravene the provisions of these sections should also extend to the latter category of persons. It is not our desire that professional advisers should come within these restrictive or penal provisions of the Act merely because they have tendered advice to directors and managers concerned and the latter have acted on such advice"—*C.L.R. para. 30.*

In this section the words "Board of directors" have been substituted for "directors" by the Joint Committee.

**8. Power of Central Government to declare an establishment not to be a branch office.**—The Central Government may, by order, declare that in the case of any company, not being a banking or an insurance company, any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the company, or any production or manufacture, shall not be treated as a branch office of the company for all or any of the purposes of this Act.

This new section has been inserted by the Joint Committee with the following observation:—“This clause empowers the Central Government to declare an establishment carrying on either the same or substantially the same activity as that carried on by the head office or any production or manufacture, not to be a branch” (*vide* J.C.R., para 12).

For definition of “Central Government”, see N. 123.

**9. Act to override memorandum, articles, etc.—Save as otherwise expressly provided in the Act—**

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.

117. These provisions are new. They are intended to make it clear that the provisions of this Act will override the memorandum, articles, agreements executed by the company, and resolutions passed in general meeting by the company and resolutions passed by the directors of the company, unless it is expressly provided otherwise in the Act itself. This section will apply whether the memorandum or articles, agreements or resolutions, be before or after coming into operation of this Act—*Notes on Clauses.*

This was cl. 7 of the Bill originally. The Joint Committee has made some verbal changes in it.

**10. Jurisdiction of Courts.—(1) The Court having jurisdiction under this Act shall be—**

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations

and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred—

(a) in respect of companies generally, by sections 237, 391, 394, 395 and 397 to 407, both inclusive ;

(b) in respect of companies with a paid-up share capital of not less than one lakh of rupees, by Part VII (sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

(3) For the purposes of jurisdiction to wind up companies, the expression “registered office” means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

118. This section is based on the following recommendation made by the Company Law Committee in para 31 of their Report : “Certain types of suits and proceedings under the Companies Act should be triable exclusively in the High Courts. In Chapter XIII we have suggested that, sections 164 and 165 of the Indian Companies Act should be so amended as to provide that winding up proceedings in respect of companies with a subscribed share capital of rupees one lac and over should take place only in the High Courts. We would further suggest that suits arising out of the new sections 153C and 153D (see now ss. 397 to 407) which we propose on the broad lines of section 210 of the English Companies Act, 1948, should also similarly be exclusively triable in the High Courts”.

In regard to winding up the District Court may be invested with jurisdiction only in respect of companies whose paid up share capital is one lac of rupees or less. In respect of certain other specified matters chief among which are those relating to investigation and remedial action where the company acts either oppressively or prejudicially to the interests of the company, jurisdiction will vest exclusively in the High Court.—*Notes on Clauses.*

The effect of this section is that the Central Government cannot confer jurisdiction upon District Courts in respect of winding up of companies with a paid up share capital of Rupees one lac and over, and in respect of companies generally by s. 237 (investigation of company's affairs), s. 391 (power to make arrangements or compromises with creditors and members), s. 393 (provisions for information as to compromises with creditors and members), s. 395 (power and duty to acquire shares of dissentient shareholders) and ss. 397 to 407 (prevention of oppression and mismanagement).

119. “Court”:—Under Act VI of 1882 the word ‘Court’ included the principal Civil Court of original jurisdiction in a district (68). The jurisdiction of the District Courts was taken away by s. 3 of the previous Act, but under the proviso to that section full or modified jurisdiction might be re-conferred by the Provincial Government on any District Court. In that case the inferior Court would be able to decide matters of administration and dispute arising in winding up (69). Sub-s. (3) of that section provided that a proceeding taken in a wrong Court should not be invalidated for that reason. But it had no application when the objection to jurisdiction was taken

(68) SS. 3 and 130 of Act VI of 1882.

(69) See *In re Stanton, Ltd.* [1928] 1 K.B. 464.

at the very commencement of the proceeding and at the proper time (70). The "Court" referred to in this section is the Court which has the power to deal with such matters as are covered by this Act itself, such as, for example, winding up proceedings and the like and has no reference to proceedings other than those under this Act (71). A suit by the board of directors for declaration that the power of the managing agents to dismiss clerks without their consent is illegal, is triable by the ordinary Courts and not by the District Court within the meaning of this section. An order passed by a Civil Court under Order 7, r. 10, C. P. Code returning the plaint in such a suit for presentation to the District Court is therefore improper (71).

**120. SUB-S. (1). High Court:—**The expression 'High Court', as used in this section, is the High Court as a whole including the appellate and the original sides. Therefore, under the Rules framed by the High Court all applications relating to companies, even those doing business in the *maffasil*, should be made on the original side of the High Court (72).

The expression High Court used with reference to civil proceedings has been defined in the General Clauses Act (73), as the highest civil court of appeal (not including the Supreme Court) in that part of India in which the Act or Regulation containing the expression operates. So the Chief Commissioner of Ajmer and Merwara is the High Court for the purposes of the Companies Act for places within its jurisdiction and not the Allahabad High Court (74).

The jurisdiction conferred on the High Court in company matters is the jurisdiction to deal with matters provided for by the Act, and it is very doubtful whether an application to rectify the register of the Registrar of Joint Stock Companies, for which no provision was made in the previous Act, could properly be brought before the Judge who was dealing with company matters (75). The High Court as the company Court has no exclusive jurisdiction in all company matters (76).

The High Court had jurisdiction to transfer winding up proceedings from the High Court to any Court which has jurisdiction to wind up companies (77). As to the power of the High Court, after making a winding up order, to direct subsequent proceedings to be had in a District Court, see s. 435 *post*.

Under the previous Act the High Court was the Court which had jurisdiction to wind up a company having its registered office anywhere in the Punjab (78).

**121. SUB-S. (2):—**Bengal—jurisdiction was conferred on all District Courts under ss. 38, 76, 120 and 124 of the old Act in respect of companies having a subscribed capital of not exceeding Rs. 50,000—Vide Notification No. 7288 Com. dated 2nd November, 1936, published in the Calcutta Gazette of the 5th November, 1936, Part I, p. 2553.

Assam—jurisdiction was conferred on the District Courts of (1) Assam Valley and (2) Sylhet & Cachar in respect of companies having a subscribed capital of not exceeding Rs. 50,000. But Assam has now got a High Court of its own.

Bombay—jurisdiction was conferred upon the District Courts of Ahmedabad, Broach, Kaira, Poona, Satara, Sholapur and Surat in all matters under the Act.

(70) *Nataranjan v. Narasimha* [1930] M. 74, 57 M.L.J. 723.

(71) *Nawabshah Electric Supply Co. v. Hariram* [1947] S. 31, 227 I.C. 33; see also *Srikrishna Jute Mills v. Mothey Krishna* [1947] M. 322, [1947] 1 M.L.J. 75, 60 M.L.W. 90.

(72) *Jagadishpur Tea Co. v. McLeod* [1929] 29 C.W.N. 404; *Mohini Mills v. Susama Debi* [1925] 52 Cal. 586, 29 C.W.N. 403, 41 C.L.J. 191.

(73) Act X of 1897, s. 3 (25) as amended by the Adaptation of Law Order, 1950.

(74) *Kekri Press Co.* [1926] 48 All. 709, 24 A.L.J. 768.

(75) *Arya Insurance Co.* [1937] C. 81, 63 Cal. 773.

(76) *Srikrishna Jute Mills v. Mothey Krishna*, *supra*.

(77) *Vernor Heaton Co.* [1936] 1 Ch. 289, 154 L.T. 374.

(78) *Raghubir v. Indian M. P. F. Insurance Co.* [1942] L. 74, 44 P.L.R. 1.

Madras—jurisdiction was conferred upon all District Courts under s. 104 only of the previous Act.

United Provinces—jurisdiction was conferred upon the District Court at Cawnpore in respect of all matters under the Act, and upon that of Lucknow in respect of companies whose subscribed capital does not exceed Rs. 25,000.

Central Provinces and Berar—jurisdiction was conferred upon all District Courts in respect of all matters under the Act.

The aforesaid orders conferring jurisdiction on District Courts in the provinces by the respective Local Governments, it is apprehended, lapsed on 1st April, 1937 on which date the amendments conferring jurisdiction on the Central Government in the Proviso to sub-s. (1) of s. 3 of the previous Act made by the Government of India (Adaptation of India Laws) Order, 1937 came into operation. Unless and until fresh Notifications were issued in this respect after 1st April, 1938, it is doubtful whether the above mentioned District Courts had jurisdiction under this Act.

In a recent case (79) however the Nagpur High Court after quoting the above passage has held that the apprehension of the author in this respect is groundless. Clause 9 of the above mentioned Adaptation of Laws Order, 1937 says that the provisions thereof shall not render invalid any notification etc. duly issued before the commencement of the said Order. Clause 10 provides that all such powers shall continue to be exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question. Their Lordships therefore hold there was no need to issue a fresh notification (79). Their Lordships further observed that even if it be held that the District Judge had no jurisdiction to entertain the winding up proceedings and as such was a wrong court, no objection to his jurisdiction could be gone into at the stage of appeal, by sub-s. (3) of s. 3 when it was not raised in the court below (79).

The Proviso to s. 3 of the old Act [corresponding to sub-s. (2) of the present section] did not constitute delegated legislation and as such was not invalid (80). A District Judge who had been empowered by the Provincial Government under that Proviso had extensive original jurisdiction; but it in no way ousted the revisional jurisdiction possessed by the High Court under s. 115 C. P. Code (81).

The District Court empowered under the Proviso by virtue of notification by the Central Government possessed unlimited jurisdiction for trying civil suits when acting as a Civil Court, and there was no jurisdiction in law for placing any fetters upon it when acting in the exercise of its jurisdiction, under sub-s. (3) of s. 79 of the old Act (82). The fact that the law does not provide for any appeal from an order passed in the exercise of that jurisdiction, and also the fact that it is always open to a party to move the Civil Court for the determination of the validity or otherwise of a meeting, are not considerations which would justify the limiting of the jurisdiction (82).

Where the registered office of a company was situated within the jurisdiction of the District Judge empowered under the above proviso, he was the Judge who had jurisdiction to pass orders for payment of any amount that might be due from the contributories on account of the arrears of calls under s. 186 of the old Act; and if there was any dispute between the parties, he could adjudicate on it under s. 216 of the old Act. The fact that certain contributories resided outside India was immaterial, as by their agreeing to become members of the company they were amenable to his jurisdiction (83).

(79) *Bharat Bank Ltd. v. K. S. Misra* [1953] N. 228.

(80) *Prabhat Film Co. v. Anant Vishnu* [1951] B. 282, 53 Bom. L.R. 106.

(81) *British India Corpn. v. Shanti Narain* [1935] A. 310, 57 All. 810.

(82) *Balkrishna v. Uma Shankar* [1947] A. 361 (F.B.), 1947 A.L.J. 337.

(83) *Sri Ganesh Co. v. Jiwan Ram* [1934] L. 362, 15 Lah. 302, 147 I.C. 739.

**122. District Court : Jurisdiction :—**For definition of "District Court", see cl. (14), of s. 2 *ante*.

It has been held in England that under s. 165 of the English Act of 1929 the High Court has jurisdiction to transfer to the County Court proceedings for winding-up, no matter what the amount of the company's capital is (84).

**123. Central Government : Definition :—**"Central Government" shall—

(a) in relation to anything done before the commencement of the Constitution mean the Governor-General or the Governor-General in Council, as the case may be ; and shall include (i) in relation to functions entrusted under sub-section (1) of section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section, and (ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act : and

(b) in relation to anything done or to be done after the commencement of the Constitution, mean the President, and shall include (i) in relation to functions entrusted under clause (1) of article 258 of the Constitution to the Government of a State, the State Government acting within the scope of the authority given to it under that clause, and (ii) in relation to the administration of a Part C State, the Chief Commissioner or the Lieutenant-Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be"—See the *Adaptation of Laws (Amendment) Order, 1950* published in the *Gazettee of India, Extraordinary, dated 5th June, 1950*.

**124. Interference by Court :—**"It is an elementary principle of the law relating to joint-stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so" (85). "Now with regard to companies," observed Chitty J., "it is right to let those who have embarked in a company manage their own affairs, and it is not right for the Court to intervene because one shareholder is dissatisfied—one who appears during the progress of the argument to have found a few associates—because that one and a small number of associates think that they know more about it than the majority" (86). But the Court will interfere—to prevent a fraudulent sale by promoters to the company ; to prevent fraud on a minority of shareholders ; where directors are withholding payment of calls on their own shares while making calls on those of other members ; where the company is existing only for being wound up and gratuities are voted to its servants and directors ; where an arrangement is being carried out which is beneficial only to the majority of shareholders ; where it is proposed to issue shares in satisfaction of dividends ; where resolutions have been passed purporting to divide, on winding up, the assets in fraud of a class of shareholders ; where the chairman of a meeting improperly rejected votes ; where a proper notice of the purpose of a meeting involving payment to directors has not been given ; where shares are being issued to secure a majority of votes ; where the majority of directors exclude the minority from meeting of the board or a committee of it ; or where the company is conducting its business in an illegal way (87). The principle that the Court will not

(84) Vernor Heaton Co., *supra*.

(85) Per Lord Davey in *Burland v. Earle* [1902] A.C. 83 at p. 93 ; see also *Foster v. Foster* [1916] 1 Ch. 532 at p. 547 ; *Bhajekar v. Shinkar* [1934] B. 243, 36 Bom. L.R. 483, 151 I.C. 126.

(86) *Nylstroom Co.* [1889] 60 L.T. 477 at p. 479.

(87) Hals. (Hailsh.) pp. 410-11 and the cases collected there.

generally interfere with the internal affairs of a company except at the instance of a majority of shareholders is applicable only where the act is merely irregular and not when it is *ultra vires* (88).

The Courts have inherent jurisdiction to compel due observance of the mandatory provisions of the Act. It is a fundamental principle of legal administration that where the law requires something to be done, there must be in existence a Court that can directly order it to be done. It is well understood in all systems of civilized jurisprudence that where there is a right, there is a remedy (89).

**125. Doctrine of "internal management" :—**People dealing with a company are fixed with notice of any limitations of the powers of the company contained in the statute under which it is incorporated or in the memorandum or articles of association; but if it is shown that a particular act was ostensibly authorized by them, persons dealing with the company are not concerned to see the company has put itself into a position to exercise its powers properly. Outside parties are not concerned with the internal management of the company. They are not concerned to see that there was a proper quorum of directors present, or that persons who are apparently directors had in fact been validly appointed. Those are matters of internal management. If the disability of a director to vote upon a contract in which he was personally interested were imposed by the articles, the question whether he was personally interested in, and entitled to vote upon, a particular contract, would be regarded as matters of internal management with which persons dealing with the company would not be concerned (90). Where the main point involved is the interpretation of a certain clause in the memorandum of association relating to the application of the assets of the company, it is not however a mere matter of internal management; a single member can therefore maintain a suit against the company for a declaration as to the true construction of the clause in question and the company cannot be excused from being impleaded in such an action (91). As regards the future conduct of directors, the Court will not interfere in the management of the company's internal affairs (91). "If the majority of shareholders consider that a particular contract of employment should be terminated, the Court would not, as a rule, consider the matter at the instance of a minority" (92).

It has however been held in England that the doctrine of "internal management" may be pushed too far and it will place limited companies at the mercy of any servant or agent who may purport to contract on their behalf. Thus not only a director of a company with articles founded on Table A, but a secretary or any subordinate officer may be treated by a third party acting in good faith as capable of binding the company by any sort of contract, however exceptional, on the ground that a power of making such a contract might conceivably have been entrusted to him (93).

Where the majority of a company propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority (94).

Where the question was whether entering into a scheme of amalgamation by one banking company with another was a matter of mere internal management and

(88) *Ramkissendas v. Satya Charan* [1946] 50 C.W.N. 310.

(89) *British India Corpn. v. Menzies* [1936] A. 568 (571), [1936] A.L.J. 748.

(90) *T. R. Pratt (Bombay) Ltd. v. E. D. Sassoon & Co. Ltd.* [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.

(91) *Bharat Insurance Co. v. Kanhaya Lal* [1935] L. 792, 160 I.C. 24.

(92) *Ramkumar v. Sholapur Spinning & Co.* [1934] B. 427, 36 Bom. L.R. 907—per Beaumont C. J. at p. 427.

(93) *Houghton & Co. v. Nothard, Lowe & Wills* [1927] 1 K.B. 246 (C.A.); on appeal [1928] A.C. 1. (All previous cases on the point have been reviewed in this case). See also *Kreditbank Cassel & Co. v. Schenkers Ltd.* [1927] 1 K.B. 826 (C.A.).

(94) *Menier v. Hooper's Telegraph Works* [1874] 9 Ch. App. 350.



therefore screened from the control of the court, the High Court was inclined to hold that it was not (95).

**126. Jurisdiction:—**The jurisdiction of the High Court under the Act in respect of companies within its jurisdiction is special and exclusive and no other Court has jurisdiction with regard to such companies. This jurisdiction is however exercised as part of the ordinary original civil jurisdiction with which it is vested by law (96). The Act extends this jurisdiction to companies outside the territorial limits of its ordinary original civil jurisdiction, and to that extent it overrides Clause 12 of the Calcutta Letters Patent; but neither this Act nor s. 45B of the Banking Companies Act, 1949 overrides Clause 11 of the Letters Patent, and further the said s. 45B is not inconsistent with and does not override ss. 38 to 41 of the Code of Civil Procedure (96).

The High Court has jurisdiction to wind up a registered unlimited company which has no capital (97); or a guarantee company having no share capital (98).

In spite of s. 226 of the Government of India Act in matters of or concerning revenue, the High Court had under the previous Act jurisdiction to consider claims by the Government in winding up, and that being so it would have jurisdiction to entertain a petition by Government, based on taxes due, to wind up a company (99).

The Dacca High Court in Pakistan has no jurisdiction over companies registered in India and having its registered office there and they were not companies within s. 2 (1) (2) of the previous Act (1).

**127. SUB-S (3). Registered office and domicile :—**The position of the company's registered office is an important factor in determining where its residence is (2); but the question of residence is entirely distinct from domicile which is often independent of actual residence (3). Irrespective of the Act, for the purposes of winding up, the domicile of a company is fixed by the situation of its principal place of business (4), that is to say, its chief office where the central management and control are actually to be found (5).

**128. Residence and Jurisdiction :—**A registered company can have more than one residence for the purposes of income-tax (6). To constitute residence by a British company in a foreign State or to render the company subject to the jurisdiction of the Courts of that State, the company must, to some extent, carry on business in that State at a definite and reasonably permanent place (7). A question often arises where a company is incorporated in a foreign State but the central office of its business is in British India, whether the British Indian Court has jurisdiction. In such a case the latter Court has jurisdiction (8). In the last case an order for winding up of the company was passed by the Court in Travancore

(95) *Kripa Ram v. Prasad* [1951] Punj. 79, 53 P.L.R. 469.

(96) *Dhakuria Banking Corpn.* [1955] N.U.C. 4849 (Cal.).

(97) *North of England &c. Assn.* [1900] 1 Ch. 481.

(98) *Monmouthshire &c. Society* [1901] W.N. 6.

(99) *Md. Amin Bros. Ltd. v. Dominion of India* [1950] 54 C.W.N. 514.

(1) *Eastern Commercial Bank* [1949] 53 C.W.N. 1 (D.R.) 85.

(2) *Cesena Sulphur Co. v. Nicholson* [1876] 1 Ex. D. 428, 35 L.T. 275.

(3) *Walcot v. Bonfield* [1854] Kay 534.

(4) *Jones v. Scottish Accident Insurance Co.* [1886] 17 Q.B.D. 421.

(5) *De Beers Consolidated Mines v. Howe* [1906] A.C. 455; *New Zealand Spinning Co. v. Stephens* [1907] 96 L.T. 50, 24 T.L.R. 172; see also *Southsea Garage Ltd.* [1911] 27 T.L.R. 295.

(6) *Swedish Central Ry. Co. v. Thompson* [1925] A.C. 495.

(7) *Littauer Glove Corpn. v. Millington* [1928] 44 T.L.R. 746.

(8) *Travancore National & Quilon Banks* [1939] M. 318.

State where the company had been incorporated, and similar proceedings were also pending in the Madras High Court. An application under s. 153 of the previous Act for getting a scheme of compromise sanctioned was made in the Madras High Court which held that the application was maintainable. "One knows", observed Vaughan Williams J., "that where there is a liquidation of one concern, the general principle is—ascertain what is the domicile of the company in liquidation, let the Court of the country of domicile act as the principal Court to govern the liquidation, and let the other Courts act as ancillary, as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the liquidation—the desire to act as ancillary to the Court where the main liquidation is going on—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation" (9). An order for winding up passed by the Court of the place of incorporation, in which the principal liquidation is going on, does not bind a foreign creditor, the special forum of whose debt was not the place of incorporation (10).

The effect of the words "under this Act" in the opening words of the section is not to make the jurisdiction of the Magistrate to take cognizance and try the case conditioned upon any necessary direction or sanction given by the High Court (11). This view is supported by a reference to the provisions of s. 5, Cr. Pr. Code and also from the fact that s. 29 of that Code does not give power to the High Court to take cognizance of offences under a law other than the Penal Code and try the accused itself without following the procedure laid down in that Code (11).

Even if the winding up of a company might be regarded as being in the nature of execution proceedings, the jurisdiction of the High Court to entertain an application for winding up presented by the Government in respect of taxes due was not barred by s. 226 of the Government of India Act, 1935 (12).

Where the directors of a company made some payments more than a month after a petition for winding up the company was presented and an application was made under s. 235 of the old Act against the directors some of whom were residing in England and one was residing in British India but in a different province, it was held that the High Court had no jurisdiction over persons residing in England, but had jurisdiction over the person residing in British India, though in a different province (13). It is a principle of international law that a Court should not serve its processes on persons outside its own jurisdiction and upon persons against whom the order, if passed, cannot be enforced. The power to serve outside jurisdiction is entirely a question of statute without which there is no such power (13).

As to the meaning of the expression "registered office" and its scope, see the case noted below (14).

As to the "situs" of share for probate duty &c., see notes to s. 82.

For other cases see notes to s. 146.

- (9) *English &c. Bank* [1893] 3 Ch. 385 (394); see also *Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196; *Queensland Mercantile Agency Co.* [1888] 58 L.T. 878 (879); *South Australian Territory Co. v. Goldsborough &c. Co.* [1889] 61 L.T. 716 (717); *Matheson Ltd.* [1884] 27 Ch. D. 225 (230).
- (10) *Vocalion (Foreign) Ltd.* (supra); *New Zealand &c. Co. v. Morrison* [1898] A.C. 349.
- (11) *Hindustan Biologicals Ltd. v. Jagat Narain* [1953] A. 715, following *Harish v. Kavindra* [1956] A. 830 (F.B.).
- (12) *Md. Amin Bros. Ltd. v. Dominion of India* [1952] C. 323.
- (13) *Bishadendu v. Reed* [1937] Pat. 196.
- (14) *Okura & Co. v. Forsbacka* [1914] 1 K.B. 715.

## PART II

### INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO

*Certain companies, associations and partnerships to be registered as companies under Act*

**11. Prohibition of associations and partnerships exceeding certain number.**—(1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.

(3) This section shall not apply to a joint family as such carrying on a business ; and where a business is carried on by two or more joint families, in computing the number of persons for the purposes of sub-sections (1) and (2), minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

(5) Every person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine which may extend to one thousand rupees.

In sub-s. (3) the words "as such" have been inserted after "joint family" by the Joint Committee.

129. :—This section corresponds to s. 4 of the previous Act. After independence it is inappropriate that companies should, hereafter be formed either in pursuance of an Act of Parliament of the United Kingdom or of Royal Charter or Letters Patent. This explains the omissions made from sub-sections (1) and (2) of that section. Sub-s. (3) makes a few drafting improvements in sub-s. (3) of s. 4 of the former Act—*Notes on Clauses*.

Sub-s. (3) excludes individual joint families carrying on a joint family trade or business from the operation of this section. But it seems that where two or more joint families carrying on joint family trade or business form a partnership and

the total number of members of such joint families, excluding their minor members, exceed twenty, these joint families will come within the mischief of this section. The argument that individual members of a joint family are to be considered as sub-partners and the joint family consisting of these members should be reckoned as one person does not appear to be sound.

Sub-s. (4) provides for personal liability of each member who would come within the mischief of the section.

Sub-s. (5) provides that such member shall also be liable to a heavy fine.

**130. Native State :—**As the previous Act (of its own force) did not apply to a Native State, the transactions in such a State of an association consisting of more than twenty members were not illegal (15).

**131. Object :—**"The object of the Act", says Lord Justice James, "was to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies so that persons dealing with them did not know with whom they were contracting and so might be put up to great expenses, which was a public mischief to be repressed" (16).

Where the proprietors of a Zemindary were numerous, the formation of a limited company by them was beneficial not only to themselves, but to those who had dealings with them (17).

**132. Indian Law :—**It means any Act, Ordinance, Regulation, rule, order or bye-law which before the commencement of the Constitution had the force of law in any Province of India or part thereof, and thereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act—See cl. (29) of s. 3 of the General Clauses Act, 1897 as amended by the Adaptation of Laws Order, 1950.

**132A. SUB-S. (1). "Banking" :—**The word "banking" has been defined in s. 5 (1) (b) of the Banking Companies Act, 1949 as meaning "the acceptance for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise." A *Samajam*, even though consisting of 15 members, which carries on money-lending business, will not be a banking company compulsorily registrable under this section, if there is no evidence to show that it was formed for accepting deposits or was actually accepting deposits at any time (18).

**133. Maximum and minimum numbers of members :—**The maximum number of members who can carry on business for gain without registration as a company is ten in the case of banking companies, and twenty in the case of any other company. But the minimum number required for the formation of a company is two in the case of a private company and seven in the case of any other company [see s. 12 (1)]. The company may be wound up by the Court, if the number of members falls below this minimum (19). For consequence of carrying on business when the number of members falls below the minimum, see s. 45. Although the number of members of a partnership does not at its inception exceed the above maximum, the company nevertheless becomes illegal, if subsequently that number is exceeded (20).

(15) *Appa Dada v. Ramkrishna* [1930] B. 5, 53 Bom. 652, 31 Bom. L.R. 1187.

(16) *Smith v. Anderson* [1880] 15 Ch. D. 247 (C.A.) at p. 273.

(17) *Lal Gopal v. Khororeah Zemindary Syndicate* [1912] 16 C.W.N. 297.

(18) *Samyuktha Samajam v. Ooli Kalyani* [1954] Tr—Coch. 50.

(19) S. 433, cl. (d).

(20) *Re Thomas, ex parte Poppleton* [1884] 14 Q.B.D. 379.

**134. Illegal association:**—An association consisting of more than the maximum number of members stated above and formed for the purpose of carrying on business with a view to gain is an illegal association (21). Such an association cannot sue on any contract made by it (22), and its members will be individually liable for the contract, unless the person suing was aware of the illegality at the time of entering into the contract (23). The members of a partnership or company hit by this section can however have beneficial interest in the property (24).

If the association of the individuals was a partnership, on each of such occasions when a death occurred and the heirs of a deceased partner were taken in, a new partnership would, in the eye of law, be formed, and this would clearly come within the words of sub-s (2); for this section governs not only the first formation of the company, association or partnership, but rules its continuance. An association formed for trading may be perfectly legal at its formation, but if the number of persons increase later on and exceed the maximum allowable under this section, the association becomes illegal (25).

Where four firms entered into a partnership and the aggregate of the number of members of all the firms exceeded twenty, it was an illegal association under this section and could not maintain a suit (26).

The illegality of a company does not protect its members from being sued by a stranger who was not aware of all the facts which made it an illegal association. Unless the person dealing with such an association is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpis causa non oritur actio* (27). In the case of an illegal association a suit can be brought against some members of the association, as the liability is joint and several under s. 43 of the Contract Act (27). Such an association cannot be wound up at the instance of the association or any of its creditors or members (28).

Such an association, however, need not be registered if it does not carry on business with a view to gain, either by the individual members or by the association as a whole (29). If the illegality of an association is not *ex facie* apparent, or if it is a mixed question of law and fact, or is a question the determination of which depends on extraneous facts, the Court is not bound to assume that the illegality exists or must necessarily come to light on a trial of the facts (30).

Where a partnership consists of more than twenty members, it is an illegal association, and a partition suit by one partner against the remaining partners is

- (21) Padstow Total Loss Association [1882] 20 Ch. D. 137; Naidu v. Mudalier [1918] 50 I.C. 513; Bhikaji v. Bapu [1877] 1 Bom. 550; Northcote Ginning Factory [1914] 26 I.C. 613; Mohideen v. Periyarayakam [1925] M. 233, 20 M.L.W. 430; Dawson v. the King [1939] R. 273; Kumaraswami v. Chinnathambi [1950] 2 M.L.J. 453, 63 M.L.W. 889.
- (22) Jennings v. Hammond [1882] 9 Q.B.D. 225; Madras H. M. B. Provident Fund v. Raghava Chetti [1895] 19 Mad. 200; Ramasami v. Nogendrayan [1895] 19 Mad. 31; Senaji v. Pannaji [1930] P.C. 300, 34 C.W.N. 1107 affirming Pannaji v. Kapurchand [1927] M. 123, 50 Mad. 175; Nibaran v. Lalit [1939] C. 187, [1938] 2 Cal. 368.
- (23) South Wales A. Steamship Co. [1876] 2 Ch. D. 763.
- (24) Nibaran v. Lalit (supra); Queen v. Tankard [1894] 1 Q.B. 548.
- (25) Nibaran v. Lalit (supra).
- (26) Pannaji v. Senaji [1934] B. 361, 36 Bom. I.R. 786.
- (27) Appa Dada v. Ramkrishna (supra).
- (28) Padstow Total Loss Association (supra); South Wales A. Steamship Co. (supra); Ilfracomb Building Society [1901] 1 Ch. 102; Mewa Ram v. Ram Gopal [1926] A. 591, 48 All. 735, 24 A.L.J. 777.
- (29) Re Siddal [1885] 25 Ch. D. 1; St. James' Club [1852] 2 De G. M. & G. 383; Wigfield v. Potter [1881] 45 L.T. 612; Crowther v. Thorley [1884] 50 L.T. 43.
- (30) Raoji v. Ratonsi [1930] B. 431 (433), 54 Bom. 696, 32 Bom. I.R. 389, 126 I.C. 305.

not maintainable (31). Illegality in the mode of formation of a partnership is not the same thing as an illegality in regard to the consideration or object of the agreement. It is doubtful if a partnership agreement which has not been registered, though so required by this section, is void under s. 23 of the Contract Act (32). In the undernoted case the Allahabad High Court refused to make a declaration under s. 42 of the Specific Relief Act that such an association was unlawful (33).

Where the members of a "chit fund" together with the organisers are less than 20, the association is not compulsorily registrable as a company under this section (34). Merely because persons choose to affix the word "Co." after the firm name, the company need not be registered under the Act. It is the number of members of the partnership that determines the question whether the company should be registered under the Act (35).

Where a firm consisting of less than twenty partners is subsequently converted into a joint stock company with additional partners so as to consist of more than twenty partners, it must be registered. If it is not registered, no suit can be maintained in respect of that partnership. But when a person, who was a partner in the firm and was, as such, entitled to a share of the profits when the membership of the firm was below twenty, is not allotted any share in the newly formed company he, being totally unaware of the increase in the number of members and of the conversion, cannot be made to lose his right to a share of the profits. A suit by him for a declaration that there has been a dissolution of that partnership, and for accounts, cannot be dismissed on the ground of non-registration under sub-s. (2) (36).

It is well established that a person who pays money to another to be used for an illegal purpose can recover the money before it has been actually used for such illegal purpose. But when the suit is laid not for the refund of any subscription and even if it is so laid there was the circumstance that the illegal partnership has carried on the business for several years with the help of that money and the plaintiff and his predecessors had had the benefit of the profits from the business, it would not be a case of an illegal purpose not having been carried out (37).

**135. Limitation :—**The starting point for computing limitation in a suit for the return of share money contributed by a person to an unregistered association of more than 20 members would be the date on which money was paid, and there would be no recurring cause of action (37).

**136. What is an association :—**To constitute an "association" within the meaning of this section, the existence of a legal relation between more than the maximum number giving rise to rights or obligations or mutual rights and duties is absolutely necessary (38). All the members of the association must be directly interested in the management of the concern either personally or through their constituted agent (39). If the substantial purpose of an association is not to carry on a business for gain, the fact that gain may accrue incidentally or may arise from merely subsidiary

(31) *Madan v. Janki* [1927] 25 A.L.J. 147, [1927] A. 487; *Kumaraswami v. Chinna-thambi*, *supra*.

(32) *Allabhux v. Saindani* [1933] S. 29.

(33) *Bhola Nath v. Lachmi Narain* [1931] A. 83, 53 All. 316, [1931] A.L.J. 84.

(34) *Sketna v. Srigiri* [1953] Hyd. 142 following *Neelamega v. Appiah*, *infra*.

(35) *Raviji v. Devchand* [1951] Kutch 55.

(36) *Parasurama v. Subburamachari* [1938] M. 151.

(37) *Kumaraswami v. Chinnathambi*, *supra*.

(38) *Ramkrishna v. Baij Nath* [1911] 8. A.L.J. 32; *Neelamega v. Appiah* [1906] 29 Mad. 477 (F.B.); *Panchena v. Gadinhare* [1897] 20 Mad. 68.

(39) *Bipul v. Hazi Nasib Ali* [1909] 13 C.W.N. 638, applying the principle of *Smith v. Anderson* (*supra*) and *Crowther v. Thorley* (*supra*).

provisions does not make registration necessary (40). The proprietors of some wool factories entered into a pooling contract by virtue of which they agreed to work on factories in a certain manner and to share the total profits in certain proportions. The contract was for a period of 5 years. The defendant No. 1 was to work his factory for the first 2½ years and defendant No. 3 for the next 2½ years; plaintiff and defendant No. 2 had the option of working their factories or not as they pleased, but if they worked them they were bound to share profits with the other parties to the contract according to the terms thereof. It was held that the contract did not constitute a partnership or association, and that the proprietors were not carrying on any business jointly within the meaning of this section (41). A pool arrangement formed between the owners of ginning factories of a particular place under which they agree that each one of them should contribute his earning to the common pool for the purpose of stifling competition and distribute the same in certain shares among them, each member of the pool being allowed to carry on his business in an unrestricted manner and being responsible to the pool, is not an association for the purpose of carrying on any business as contemplated by this section (42).

Persons who joined themselves together in the purchase of a property and have remained joint as owners and for holding and using it in order to make gain thereby, are an association within s. 3 of the Income Tax Act XI of 1922 (43).

A trading association which is synonymous with the term "a trading company" or "a trading society" to be within this section, must also be one formed on the basis of contract between its members (44).

**137. "Partnership":**—The use of the word "partner" or "partnership" in the agreement does not necessarily show that there was a partnership. The parties may call themselves partners, but if it appears that one party is to do nothing more than advance money to the other and is to be repaid by a share of profits, they must be treated as creditor and debtor and not partners (45).

**138. Effect of non-registration:**—Where an association is compulsorily registrable under this section, but is not registered, one member of the association cannot sue another member in respect of any matter connected with the association (46), nor can a member or outsider maintain a suit against the association, for it cannot contract any debt (47), or enter into any contract (48). One of the members of such a company cannot sue for partition of the existing assets, or for any other relief (49). An association which is illegal cannot be wound up under the Act at the instance either of the association, a creditor or a shareholder (50). So too, an action by an illegal association, whether against a member or any other person, will fail as soon as the illegality is disclosed (51). Such an association being an illegal body, its existence will not be recognized by law, and although a suit by a third party against

(40) *Kraal v. Whympere* [1890] 17 Cal. 786.

(41) *Madan v. Shewlal* [1934] L. 882, 154 I.C. 156, 16 Lah. 574.

(42) *New Moffussil Co. v. Rustomji* [1931] 60 Bom. 800, 38 Bom. L.R. 408.

(43) *In re Elias* [1935] 40 C.W.N. 476.

(44) *Nibaran v. Lalit* [1939] C. 187, [1938] 2 Cal. 368.

(45) See s. 6, *Partnership Act*, 1932 and *Bhaggy Lal v. De Gruyther* [1882] 4 All. 74; *Bipul v. Nasib* [1909] 13 C.W.N. 638, 1 I.C. 655; *Mahomed Yusuf v. Pir Mohammad* [1922] 65 I.C. 368.

(46) *Ramkrishna v. Baijnath* (supra); *Kumaraswami v. Chinnathambi* [1951] M. 291, [1950] M.L.J. 453.

(47) *Re London Marine Association* [1869] 8 Eq. 176.

(48) *Jennings v. Hammond* [1882] 9 Q.B.D. 225 at p. 229.

(49) *Mewa Ram v. Ram Gopal* (supra); *Nathu v. Wali Mohammad* [1933] L. 121; *Kumaraswami v. Chinnathambi*, supra.

(50) *Padstow Total Loss Assn* (supra); *Raghubar v. Sarrafa Chamber* [1954] A. 555.

(51) *Re Day* [1876] 1 Ch. D. 699.

the members of such an association is maintainable in certain circumstances, it would not be maintainable if the plaintiff was *particeps criminis* (52). It has been held by the Rangoon High Court that members of such an illegal association can bring a suit for declaring the respective shares of their association and directing that they be repaid their shares after recovering the buildings and other property of the association, into which the subscription money is changed, into cash and after payment of debts and liabilities. Such a suit is governed by Art. 120 and not Art. 62 of the Limitation Act (53).

A person cannot maintain an action which arose out of transactions with an illegal association (54). It is not open to a partner of an illegal partnership to claim a refund of his original subscription after participating in the profits of the partnership for several years (55). But where the agreement has been made and the contribution has been paid by one associate to another and the business has not been started, there is an equitable principle that the associate should get back the money. The principle of *pari delicto* does not come in, because the delict, though contemplated and agreed to, has not yet been committed (56). Money lent to an illegal association for the purpose of carrying out its object cannot be recovered (57). Where an illegal partnership was for a considerable time carried on in defiance of the law and the money subscribed was utilized for its objects, it cannot be recovered back, nor the share of the assets of the partnership by a member thereof (58). Where an association of more than 25 persons was formed but not registered and the promoters took money from the shareholders, it was held however that as the Act imposed the duty of registering the association upon the promoters, they could not be heard to insist on their own neglect to register it as a defence to an action for recovery of the money (59).

The effect of non-registration is that the company, association or partnership will have no legal existence as such, but it does not prevent the individual members from transacting business with third parties (60).

A *kuri chit* transaction, whereby a number of persons subscribe a certain sum of money by instalments, and each in turn, as determined by lot, takes the whole of the subscription for the instalments executing a bond for securing payment of further subscriptions, is not illegal under this section or s. 294A of the Penal Code. A bond containing the above provision can be enforced by suit (61). Where a chit concern is the business of one person alone and the *chit* collections are under his control and at his absolute disposal and the subscribers have nothing to do with the management of it, registration of such fund is not compulsory, though it may consist of more than 20 subscribers (62). But where a *chit* agreement gave certain persons, nine in number, the right to conduct the affairs of the *chit*, and the whole body of subscribers, more than 20 in number, joined in the agreement and retained power in themselves to control the acts of their appointed office-holders, it was held

(52) *Madan v. Shewlal* (supra).

(53) *U. Sein Po v. U. Phyn* [1930] R. 21, 7 Rang. 540, 120 I.C. 902; followed in *Jagannath v. Perumal* [1953] A.J. 14.

(54) *Josephs v. Pebrer* [1825] 3 B. & C. 639.

(55) *Kumaraswami v. Chinnathambi*, supra; *Ram Dass v. Mukut Dhari* [1952] V.P. 1.

(56) *Ram Dass v. Mukut Dhari* [1952] V.P. 1.

(57) *Philips v. Davis* [1888] 5 T.L.R. 98 following *Jennings v. Hammond* [1882] 9 Q.B.D. 225 & *Shaw v. Benson* [1882] 11 Q.B.D. 569.

(58) *Gopilal v. Panduran* [1926] N. 241, 92 I.C. 640.

(59) *Brett v. Montreaux* [1854] 1 K. & J. 98.

(60) *Hasanali v. Ratilal* [1953] Sau. 141.

(61) *Vasudevan v. Mammud* [1898] 22 Mad. 212.

(62) *Subbier v. Ramier*, 2 M.L.T. 52.



that the agreement required registration (63) and no suit could be maintained upon a bond by the subscribers in such a case (64).

Where an association is illegal as being an unregistered association of more than twenty persons carrying on a business having for its object the acquisition of gain (65), the Court is not debarred from affording relief to the members asking for return of the money paid into the hands of agents, by granting an account (66). The cause of action for the return of money paid in order to form a society or business prohibited by this section accrues as soon as the money is paid, and there is no continuing cause of action in such a suit (67).

An association which ought to have been, but is not, registered under this section, is however liable to assessment to income tax on its profits (68).

**139. Limitation** :—The starting point of limitation in a suit for return of share money would be the date on which the money was paid, and there would be no recurring cause of action (69).

**140. Sub-s. (2)** :—In order that sub-s. (2) might apply, it is necessary that in the first place there should be either a company, association or partnership consisting of more than 20 members. Secondly, such company, association or partnership must be formed for the purpose of carrying on business other than the business of banking. Thirdly that business must have for its object the acquisition of gain, either to the company, association or partnership, or to the individual members thereof (70).

Any association or company formed in contravention of these must be held to be illegal, and no Court should entertain a suit brought in relation to such company or association (71).

**141. "Formed"** :—Where an association consisting of more than 20 persons was formed before the commencement of the English Act of 1862, it was held that the association was not "formed" within the meaning of s. 4 on each occasion of a change of membership and did not require registration under the Act (72). It should be noted that provisions of this section were in existence in the previous Indian Acts since 1866.

**142. "Carrying on business"** :—The expression "carrying on business" implies some continuous control of the business by the association (73). "Carrying on business" only exists where there is a joint relation of more than twenty persons for the common purpose of performing jointly succession of acts and not where the relation exists for a purpose which is to be completed by the performance of a single act (74). Where a business is carried on by trustees less than twenty in number, but the beneficiaries are more than twenty, the association is not illegal (74). Unregistered land companies have been held to be not illegal on the ground that they were formed merely for acquiring and dividing land between the members and

(63) *Narayanasami v. Jambu Aiyar* [1900] 11 M.L.J. 130.

(64) *Ramasami v. Nagendrayyan* [1895] 19 Mad. 31.

(65) *Greenberg v. Cooperstein* [1926] Ch. 657.

(66) *Ibid.* But see *Shaw v. Benson* [1882] 11 Q.B.D. 563; *Barclay v. Pearson* [1893] 2 Ch. 154; *Wilkinson v. Levison* [1925] 42 T.L.R. 97 and *Jennings v. Hammond* [1882] 9 Q.B.D. 225.

(67) *Ram Kumar v. Nem Chand* [1921] 19 A.L.J. 836.

(68) *Sri Gopalji Co. v. Commissioners of Income Tax* [1931] 1 L. 376.

(69) *Kumaraswami v. Chinnathambi*, *supra*.

(70) *New Moffussil Co. v. Rustomji* [1931] 60 Bom. 800, 38 Bom. L.R. 408.

(71) *Uthayya v. Somayya* [1955] Mvs. 149.

(72) *Shaw v. Simmons* [1883] 12 Q.B.D. 117.

(73) *Madan v. Shewlal* (*supra*).

(74) *Smith v. Anderson* [1880] 15 Ch. D. 247 (C.A.); *Crowther v. Thorley* [1884] 50 L.T. 43.

not for carrying on any business of land jobbing or trafficking in land (75). As to the meaning of the expression see *Okura & Co. v. Forsbacka* (76).

**143. "Business":**—"Business," is a wider term than "trade" and may include hiring land and employing a manager to farm it (77). Where an association or partnership is formed for purposes of carrying on a business, what the Court has to see is whether each of the members will be liable individually upon contracts made and whether each would have rights accruing to him upon such contracts (78). A single venture, where a single article or a number of articles on a single contract are purchased and sold, may not amount to a business, but where a number of sales are purchased at one time, sales are to go on, profits are to be realized and these profits are to be divided among the partners, it is not a single venture and amounts to a partnership within this section (79). "Business" does not include the case of an association of persons who contribute sums to be applied in relieving its members in the case of sickness, the balance being distributable at the end of each year (80).

Failure to register a firm under this Act can have no effect upon its business (81).

The word "business" must be construed in a reasonable manner. The words "any other business" show that what the legislature contemplated is something which must be business in the same sense in which banking is, although impliedly described as business (82).

**144. Person:**—The word "person" denotes an individual and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section (83). So an association of several persons, consisting of more than twenty persons, formed with the object of acquiring commercial gain, is essentially within the purview of this section (83). But it has been held by the Allahabad High Court that a person, who holds shares in a company personally as a trustee for a number of beneficiaries or as a guardian for a minor, is to be counted as one individual person, on the ground that the word "person" in this section can be used to include a collection of people, e.g., an association of individuals known as a joint Hindu family, or beneficiaries interested beneficially in property vested in a trustee (84). If the various individual members of one or more joint Hindu families form an agreement of partnership among themselves, then each individual member must be reckoned as a person for the purpose of this section. If, however, there is merely a family partnership created by operation law, so that the individual members are governed by the principles of Hindu law and not by the Contract Act, then the individual members are merely sub-partners in any agreement made on behalf of the family, and the joint family consisting of these members should be reckoned as one person for the purposes of this section (85). Sub-partners are not members of a firm and

(75) *Wigfield v. Potter* [1881] 45 L.T. 612; *Re Siddal* (supra); *Crowther v. Thorley* (supra).

(76) [1914] 1 K.B. 715.

(77) *Harris v. Amery* [1865] L.R. 1 C.P. 148; *Commissioners of Inland Revenue v. Korean Syndicate* [1920] 1 K.B. 598, 603, on appeal [1921] 3 K.B. 258.

(78) *Pannaji v. Kapurchand* [1927] 51 M.L.J. 667, 50 Mad. 175, [1927] M. 123.

(79) *Senaji v. Pannaji* [1930] P.C. 300, 59 M.L.J. 435, 34 C.W.N. 1107; see also *Pannaji v. Senaji* [1934] B. 361, 36 Bom. L.R. 786, 152 I.C. 580.

(80) *One & All Sickness Assn.* [1909] 25 T.L.R. 674.

(81) *Ravji v. Devchand* [1951] Kutch 55.

(82) *New Mofussil Co. v. Rustomji*, (supra).

(83) *Akola Gin Combination v. Northcote Ginning Factory* [1914] 26 I.C. 613; *Pannaji v. Kapurchand* (supra); *Senaji v. Pannaji* (supra).

(84) *Motiram v. Mahammad Abdul* [1924] 22 A.L.J. 487, [1924] A. 411; *Mewa Ram v. Ram Gopal* [1926] 24 A.L.J. 413, 48 All. 395.

(85) *Bisanchand v. Govinda* [1934] N. 45; *Pannaji v. Kapurchand* (supra); *Senaji v. Pannaji* (supra). But see sub-s. (3) and notes thereon (supra).

the existence of sub-partners would not affect the number of members of a firm for the purposes of this section (86). But where persons exceeding twenty calling themselves as partners of four different unregistered firms, enter into a partnership to carry on business, and each person is individually entitled to the benefit of the contracts, the partnership is illegal under this section (87).

On the question whether a company registered under this Act is a "person" within the meaning of this section. King, C. J. and Zilul Hassan, J. observed : "We are doubtful whether registered companies cannot be held to be "persons" within the meaning of s. 4 (of the previous Act) as a registered company is a corporation and for most legal purposes can be held to be a person" (88). In England under the Solicitors Act, 1932 [*Law Society v. United Service Bureau* (1934) 1 K.B. 343], the Dentists Act, 1878, the Veterinary Surgeons Act, 1881 and the Pharmacy Act, 1868 [*Pharmaceutical Society v. London & Provincial Supply Assn.* (1880) 5 App. Cas. 857] a "person" means a natural person and not a body corporate.

**145. "Gain":**—"Gain" is not limited to pecuniary gain or commercial profit only; and a company is formed for the acquisition of gain when it is formed to acquire something as distinguished from a company formed for spending something (87). If one of the objects of a company be the acquisition of gain, the mere fact that the members either singly or jointly propose to dispose of the gain on some charitable object will not exclude the company from the purview of this section (89). The primary object of the association is to be looked into and no regard should be paid to the circumstances that develop later on (90).

**146. Foreign companies:**—A limited company incorporated under the laws of another country may trade in this country without being incorporated according to our law (91). The word "formed" in this section must mean "formed in this country" (92). If however a company incorporated in the foreign country established a place of business here, it must comply with the provisions of ss. 592 *et seq.* (92). A foreign company cannot be registered as an existing company under the Companies Act (93), and cannot, unless it has an office in this country, be wound up here (94).

**147. Other companies:**—The expression "or is formed in pursuance of some other Act" probably means formed and having existence recognized by another statute (95). An unregistered company consisting of nine shareholders only does not require registration for its valid existence (96). Mutual assurance associations are within the section (97).

**148. Sub-s. (3):**—Even before the new sub-s. (3) of s. 4 of the old Act came into operation, it was held that a joint family business concern, which by its nature descends from father to son, in which interests are acquired by succeeding generations, not by an act of parties but by the law of inheritance, was not an

(86) *Chandulal v. Keshavlal* [1936] B. 246, 38 Bom. L.R. 486.

(87) *Senaji v. Pannaji* (supra).

(88) *Raghunath v. Lucknow Sugar Works* [1936] O. 56 (59), 159 I.C. 121.

(89) *Arthur Average Assn.* [1875] 10 Ch. App. 542; *Padstow Total Loss Assn* (infra) *Tan Waing v. Bo Hein* [1932] R. 167; *Uthayya v. Somayya* [1955] Mys. 149.

(90) *Chheddi Lal v. Punna Lal* [1930] A. 186, 52 All. 325, [1930] A.L.J. 337.

(91) See *Bateman v. Service* [1881] 6 App. Cas. 386.

(92) *Buckley*, 10th ed., p. 4.

(93) *Bulkely v. Schutz* [1871] L.R. 3 P.C.C. 764.

(94) *Llord Generale Italiano* [1885] 29 Ch. D. 219.

(95) *Ilfracomb & Co. Society* [1901] 1 Ch. 102.

(96) *Mohideen v. Periyannayakam* [1925] 20 M.L.W. 430, 84 I.C. 118.

(97) *Padstow Total Loss Assn.* [1882] 20 Ch. D. 137.

association of persons in this sense and did not therefore come within the scope of this section (98).

**149. Sub-s. (5):**—Sub-ss. (1) and (2) are the only sub-sections to which the wording of sub-section (5) can be applied. This sub-section does not punish a person for having been a member, prior to its enactment, of an illegal association, company or partnership formed in contravention of sub-s. (2). But sub-section (5) is applicable to persons who continue to be members of such illegal association, company or partnership after the enactment of this sub-section, even though this illegal association, company or partnership was formed before the enactment of the sub-section (99). It is true that offences under sub-s. (5) and s. 278 (3) of the old Act, (see now s. 624 *post*) are non-cognizable and cannot be investigated by the police under Chap. XIV of the Code of Criminal Procedure, 1898; but the mere fact the offences were wrongly investigated and sent up by the police is not an obstacle to their being tried by a Magistrate (1). There is no legal objection to the proceedings being dropped by the Magistrate, if he finds that he ought not to have taken cognizance of the offence under this sub-section (99).

Where a company consisting of more than 20 persons formed in 1922-23 is unregistered, the members thereof can be punished for continuing to be members of such company under sub-s. (5) though they cannot be punished for originally forming themselves into a company in contravention of sub-s. (2) (2).

### *Memorandum of Association*

#### **12. Mode of forming incorporated company.—(1)**

Any seven or more persons, or where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

(2) Such a company may be either—

(a) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed “a company limited by shares”);

(b) a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up (in this Act termed “a company limited by guarantee”); or

(98) *Nibaran v. Lalit* [1959] C. 187, [1958] 2 Cal. 368; see also *Mewa Ram v. Ram Gopal* [1926] 48 All. 895; *Moti Ram v. Md. Abdul* [1924] 46 All. 509.

(99) *Muthuveeran v. Mottayan* [1942] M. 283, [1942] 1 M.L.J. 230, [1942] M.W.N. 121.

(1) *Dawson v. the King* [1939] R. 273.

(2) *Muthuveeran v. Mottayan*, *supra*.

(c). a company not having any limit on the liability of its members (in this Act termed "an unlimited company").

This section corresponds to s. 5 of the old Act and s. 1 of the English Act of 1948. No change of substance has been made.—*Notes on Clauses.*

As to the meaning and privileges of a private company see notes to s. 3 (1) (iii).

**150. "Persons":**—The word "persons" includes a married woman, a bankrupt and a foreigner residing abroad (3), but not an infant, as under the Indian Contract Act a contract made by him is void (4). A firm is not a person, and the individual partners must subscribe (5). If a firm name is, with the authority of the firm, subscribed to a memorandum of association and is accepted by the Registrar, the partners will be joint holders of the shares subscribed for (6), provided the partner subscribing had special authority from his co-partners to accept the shares (7). The Registrar's certificate of incorporation is conclusive (8); but it will not make the illegal objects legal (9), nor does it obviate the objection that the memorandum was not signed by seven persons (10).

**151. "Lawful purpose":**—The purpose for which a company is proposed to be established must be lawful. It must not be in contravention of the general law of the country, e.g., to run a lottery. Where a scheme purports to grant interest-bearing loans on personal security to persons chosen by lot, it falls within s. 294-A of the Penal Code and as such is illegal (11). Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were philanthropic will not save the company from being unlawful. The purpose would still be illegal even where the illegal business is merely annexed to the real one which is philanthropic (12). Where a company was formed in England for the sale there of tickets and chances in one Irish lottery, it was held that the object of the company was unlawful and that the Registrar was right in refusing to register the company (13).

**152. Signatories to memorandum:**—In the absence of special regulation requiring the signatories to the memorandum to pay for their shares, they are not liable to do so, until a call has regularly been made upon them (14). A subscriber to the memorandum cannot, however, obtain rescission of his contract to take the shares subscribed on the ground of misrepresentation (15). He remains a member until such time as either the company which being authorised by its articles accepts a surrender of the shares for valid reasons, or the subscriber himself pays for the shares and validly transfers them to somebody else (16).

**153. Members:**—Members are deemed to be aware of the contents of the memorandum and the articles of association (17). In fact it is the duty of a person

- (3) *Princess of Reus v. Bos* [1871] L.R. 5 H.L. 176, appeal from *General Company &c. for Land Credit* [1870] 5 Ch. App. 353; *A.—G. v. Jewish Colonisation Assn.* [1901] 1 K.B. 123.
- (4) *Mohori Bibi v. Dharmadas* [1903] 30 Cal. 539 (P.C.), 30 I.A. 114. For the position of an infant in England see *Laxon & Co.* [1892] 3 Ch. 555.
- (5) See *Palmer's Company Law*, 13th ed., p. 29.
- (6) *Weikersheim's case* [1873] 8 Ch. App. 831.
- (7) *Niemann v. Niemann* [1889] 43 Ch. D. 198 (C.A.).
- (8) See s. 35 and notes.
- (9) *Bowman v. Secular Society* [1917] A.C. 406 at p. 439.
- (10) *Re Laxon & Co.* [1892] 3 Ch. 555.
- (11) *Pioneer M. B. & F. Society v. Asst. Registrar* [1933] M. 129, 141 I.C. 107.
- (12) *Universal Mutual Aid &c. Assn. v. Naidu* [1933] M. 16, M.L.J. 554, 139 I.C. 644.
- (13) *Exp. More* [1931] 2 K.B. 197.
- (14) *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56 (C.A.).
- (15) *Lord Lurgan's case* [1902] 1 Ch. 707.
- (16) *U. P. Oil Mills Co.* [1931] A. 701, 133 I.C. 424.
- (17) *Campbell's case* [1873] 9 Ch. App. 1.

taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of these documents and he must take the consequences of his neglect (18).

**154. Third persons:**—The memorandum of association does not constitute a contract between the company and a third party who may be named therein (19), but third persons who have dealings with a company are also affected with notice of the provisions contained in the memorandum and the articles (20); they are not however bound to make further inquiries, and they may assume that the internal management of the company has been regular (21). Actual or constructive notice of an irregularity prevents a person contracting with the company from obtaining the protection of the rule that the regularity of internal management of a company may be relied on (22). When an agreement on behalf of a company is entered into with a stranger by one of the directors then, if it was possible under the articles of association for authority of all the directors to be delegated to one, and the stranger is aware of no facts to the contrary, the agreement will bind the company irrespective of whether such delegation has in fact taken place or not (23). If a person dealing with a company has satisfied himself that such dealings are within the scope of the articles of the company and could be validly entered into by a person duly empowered on its behalf and he finds a representative of the company entering into such dealings on behalf of the company and acting as if duly empowered, he is not bound to enquire further whether as a matter of fact such representative has been so empowered (24).

No third person dealing with the directors of a company can be affected by its bye-laws unless it was provided that he knew of them (25). See notes to s. 26 under the heading—"Duties of persons dealing with a company."

**155. "One man company":**—Where a company was incorporated according to law and six of the subscribers held only one share each and the seventh held the balance of the twenty thousand shares issued, the House of Lords held that the Court could not inquire whether or not such a "one man" company was intended by the legislature when passing the Companies Act (26). But in a later case *Philimore, J.* held that a limited company may be a mere *alias* of the principal members in a case where fraud is shown (27) and a sale to such a company may turn out to be fraudulent (28). But see notes to s. 34.

**156. How a company is ended:**—A company once brought into existence by incorporation cannot be got rid of unless by winding up, even if the incorporation

(18) *Oakes v. Turquand* [1867] 2 H.L. 325.

(19) *Ramkumar v. Sholapur Spinning & Co.* [1934] B. 427, 36 Bom. L.R. 907.

(20) *Mahony v. East Holyford Mining Co.* [1875] 1 R. 7 H.L. 869; *Whitechurch Ltd. v. Cavanagh* [1902] A.C. 117.

(21) *County of Gloucester Bank v. Rudry Merthyr & Co.* [1895] 1 Ch. 629; *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93; but see *Premier Industrial Bank v. Carlton Manfg. Co.* [1909] 1 K.B. 106, dissented from in *Dey v. Pullinger Engineering Co.* [1821] 1 K.B. 77.

(22) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366 (P.C.); *General P. Assurance Co.* [1869] 38 L.J. (Ch.) 320.

(23) *Probodh v. Road Oils Ltd.* [1930] C. 782, 57 Cal. 1101, 34 C.W.N. 570.

(24) *Krishna Mills Co. v. Gopinath* [1903] 47 P.L.R. 1904, 81 P.R. 1903.

(25) *Asiatic Banking Corpn.* [1869] 4 Ch. App. 252.

(26) *Salomon v. Salomon and Co.* [1897] A.C. 22; see also *A.—G. for Canada v. Standard Trust Co.* [1911] A.C. 498; *Booth v. Helliwell* [1914] 3 K.B. 253; *Commissioners of Inland Revenue v. Sansom* [1921] 2 K.B. 492, 501.

(27) *Re Darby, exp. Brougham* [1911] 1 K.B. 95.

(28) *Re Fascy* [1923] 2 Ch. 1; *Gonville's Trustee v. Patent Caramel Co.* [1912] 1 K.B. 599; *Re Hirth* [1899] 1 Q.B. 612; *Re Slobodinsky* [1908] 2 K.B. 517; *Re David* [1913] 2 K.B. 694.

was an abuse of, or fraud upon, the Act of the legislature (29). The Registrar may however under s. 560 strike the name of a defunct company off the register and declare it dissolved. See s. 560 and notes.

**157. Infant's signature :—**In England the contract of an infant being voidable and not void, his signature to the memorandum of association is the signature of 'a person', and subsequent avoidance of the infant's contract does not invalidate the registration or any intermediate acts affecting rights of third persons (30).

**158. Subscribers :—**The subscribers to the memorandum need not be beneficially interested in the shares for which they have subscribed (31). The memorandum of association has the effect of prescribing as well as limiting the liability of the members (32).

**159. Limitation of liability :—**The limitation of liability in respect of shares held is distinct from an obligation collaterally imposed upon a member, in certain events, to take up further shares which will themselves, when taken up, be entitled to similar limitations of liability. There is nothing in such collateral obligation which is *ultra vires* or repugnant to the system of limited liability (33).

But such obligation cannot be imposed on old members by altering the memorandum or the articles. See s. 38 *post*.

Subject to certain restrictions there would appear to be no limitation upon the purpose for which a company may be formed under the Act (34).

**160. No personal liability :—**Under subs (2) (a) the liability of the members is limited to the amount payable on the shares. There can be no personal liability on the shareholders or directors in respect of the debts of the company (35). There is no statutory provision in the Companies Act which entitles the creditors or even the Government to proceed against the directors for taxes payable by the company (35). Where sales tax is assessed on a limited company, the Collector is entitled to proceed against assets of the company. Proceedings taken against the shareholders or their personal assets are void (36).

### 13. Requirements with respect to memorandum.—

(1) The memorandum of every company shall state—

(a) the name of the company with "Limited" as the last word of the name in the case of a public limited company, and with "Private Limited" as the last words of the name in the case of a private limited company ;

(b) the State in which the registered office of the company is to be situate ; and

(29) *Princess of Reuss v. Bos* [1871] L.R. 5 H.J. 176.

(30) *Re Laxon & Co.* (supra).

(31) *Salomon v. Salomon & Co.* and other cases in note (26) supra.

(32) *Oregum Gold Mining Co. v. Roper* [1892] A.C. 125 ; *Welton v. Saffery* [1897] A.C. 299, 322.

(33) *Agricultural W. Society v. Biddulph & Co. Society* [1925] 1 Ch. 769.

(34) *R. v. Registrar of Companies* [1911] 3 K.B. 116 ; *Bowman v. Secular Society* [1917] A.C. 466, [1915] 2 Ch. 447.

(35) *Desi Raju, in re* [1955] Andhra 26

(36) *Parmeshwari v. Collector* [1955] N.U.C. 2728 (All.).

(c) the objects of the company, and, except in the case of trading corporations, the State or States to whose territories the objects extend.

(2) The memorandum of a company limited by shares or by guarantee shall also state that the liability of its members is limited.

(3) The memorandum of a company limited by guarantee shall also state that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company, or of such debts and liabilities of the company as may have been contracted before he ceases to be a member, as the case may be, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(4) In the case of a company having a share capital—

(a) unless the company is an unlimited company, the memorandum shall also state the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount ;

(b) no subscriber of the memorandum shall take less than one share ; and

(c) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

This section combines ss. 6, 7 and 8 of the old Act and is based on s. 2 of the English Act of 1948.

Cl. (a) of sub-s. (1) has been substantially altered by the Joint Committee with the following observation: "The Committee are of the view that the name of a company should indicate whether it is a private or a public company. It has accordingly been provided that the name of every private company should end with the words "Private Limited" (*vide* J. C. R., para 13).

**161. Sub-s. 1 (a). "Limited" :—**In the memorandum of association of a company limited by shares or guarantee, the company should be described as "Limited", unless it is formed for one of the objects specified in s. 25 and a license of the Central Government is obtained. When making a contract, an abbreviation such as "Ltd." or "Ld." may be used (37). For the consequences of omission of the word or its abbreviation see s. 147 and notes thereto.

The name of a company may be changed by a "special resolution" and subject to the approval of the Central Government (38).

(37) *F. Stacey & Co. v. Wallis* [1912] 28 T.L.R. 209, 106 L.T. 544.

(38) See s. 21 and notes.



**162. Sub-s. 1 (b) :—**Every company must have a registered office the situation of which and any change thereof must be notified to the Registrar (39). See notes to s. 10 and s. 146.

This clause provides that the memorandum must state the State in which the office of the proposed company must be situate; but once that State has been declared, there is no valid reason why the company should not fix its office anywhere it likes within the State and change it from time to time on giving notice (40). See s. 146.

**163. Sub-s. 1 (c) :—**This clause further requires that the memorandum must state, except in the case of trading corporations, the State or States to which the objects extend. For definition of a "trading corporation" see s. 2 (49).

**164. Objects of company :—**The capacity of a company to acquire rights and incur obligations is limited by the object to attain which it is created, and these limits must be regarded whenever and wherever the extent of the corporate powers has to be judicially decided (41). The objects of a company should be clearly set forth in the memorandum, for a company can do only what is within, or incidental to, the objects stated therein (42). The objects as stated in the memorandum cannot be departed from except so far as permitted by s. 17 of the Act. The memorandum is the charter of the company (43). Consequently a contract made by the directors upon a matter not included in the memorandum is *ultra vires* and it cannot be made binding on the company by being expressly assented to at a meeting of shareholders, even by the whole body of them (44).

It is not enough to state the object to be to carry on any business which the company may think profitable, for this defines nothing. The memorandum should specifically enumerate all the business the company is likely to undertake, as the words "to do all such things as may be deemed incidental or conducive to the attainment of the above objects or any of them" will only cover operations of a nature similar to the businesses previously mentioned (45).

Since the company was registered with a memorandum of association which set out its objects, neither the documents preliminary to incorporation nor the action of the directors after formation could properly be received in evidence to determine what the objects of the company were (46).

**165. Wide powers :—**Wide powers taken in general words will be construed as merely ancillary to the specific objects mentioned in the earlier clauses (47). A mining company should take powers to construct railways, tramways, canals, roads &c., and also to acquire lands and to dispose of them. Similarly, a bank or a loan company should take powers to develop, turn to account or improve land that may come into its possession.

(39) S. 146.

(40) Arya Insurance Co. [1937] C. 81.

(41) Sabaratnam v. O. I. Travancore N. & Q. Bank [1943] M. 111, 55 M.L.W. 653.

(42) Ashbury Ry. Carriage Co. v. Riche [1875] L. R. 7 H. L. 653; Baroness Wenlock v. River Dee Co. [1883] 36 Ch. D. 675n. See also the dictum of Bowen L. J. in Guinness v. Land Corporation of Ireland [1883] 22 Ch. D. 349; Deuchar v. Gas Light & Coke Co. [1925] A.C. 691.

(43) Ashbury Ry. Carriage &c. Co. v. Riche (supra), Re Crown Bank [1890] 44 Ch. D. 634.

(44) Ashbury Ry. Carriage Co. v. Riche (supra).

(45) London Financial Assn. v. Kelt [1884] 26 Ch. D. 107.

(46) Tennant Plays, Ltd. v. Inland Rev. Comrs. [1948] 1 A.E.R. 506 (C.A.).

(47) German Date Coffee Co. [1880] 20 Ch. D. 169; Stephens v. Mysore G. R. Mining Co. [1902] 1 Ch. 745; Pedlar v. Road Block Mines [1905] 2 Ch. 427. But if there is a provision that each clause is to be read separately and not limited by other clauses, the difficulty may be overcome; Re Anglo-Cuban Oil Co. [1917] 1 Ch. 477 affirmed by the House of Lords *sub non*. Cotman v. Brougham [1918] A.C. 514 overruling Stephens v. Mysore G. R. Mining Co. (supra).

Where the memorandum of a company in its final clause took power "generally to transact any business of merchant or capitalist either as principal or agent," this wide power was cut down by the Court to conform with the objects of the company (48).

**166. Construction of objects clauses :—**Courts are not disposed to construe even the widest powers in such a way as to enable a company to go outside the main objects for which it was formed (49). The powers of a company, however, should not be construed strictly, and the company may do anything that is fairly incidental to the powers specified (50). In *Egyptian Salt & Soda Co. v. Port Said Salt Association* (51) their Lordships of the Judicial Committee observed as follows: "The learned Judge says that 'the memorandum is to be construed strictly'. If by this he meant merely that the memorandum must be construed in accordance with the accepted principles applicable to the interpretation of all legal documents, no exception need be taken to his statement, but if he meant that a specially rigid canon of construction is to be applied to the memorandum of association of limited companies, their Lordships do not agree. A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs." In the case noted below, the Court of Appeal in England strongly commented upon the practice of enumerating every possible operation as an object of the company in a string of clauses with a statement that each clause is independent of and not ancillary to any other clause (52). But it has also been held in this case that if a company state in the memorandum all the possible things the company may desire to do as independent main objects, and if this is the clear intention of the document, the Court will construe it in this manner (52). Where the objects of a company were stated in the widest terms and included power to enter into and carry into effect an agreement referred to in art. 3 of the articles of the company and the various objects of the company were to be regarded as independent objects and the name of the company was not to be taken as operating to restrict the various powers set out in the clause, it was held that the company had not been formed solely to work the rubber estate which was acquired in accordance with the agreement mentioned above (53). Where however the main object is gone, the company will be wound up (54). Whether any particular transaction is or is not within the powers of a company, is a question of law depending on the construction of the objects clause of the memorandum of association (55).

In the absence of a clause in the memorandum declaring that each item of the object clause is to be treated as an independent object and not to be controlled or whittled down by the rest, the ordinary rule of construction applicable to all written documents has to be followed, namely, the memorandum must be read as a whole (56). In the last cited case sub-cl.(h) of cl. 3 of the memorandum contained the following :  
 "(h) to sell, improve, manage, develop, exchange, lease or let, under-lease or sub-let,

(48) *Govind v. Rangnath* [1930] B. 572 (577), 54 Bom. L. R. 232.

(49) *Amalgamated Syndicate* [1897] 2 Ch. 600; *London County Council v. A. G.* [1902] A.C. 165.

(50) *Foster v. London C. & D. Ry. Co.* [1895] 1 Q. B. 711.

(51) [1931] A. C. 677 at p. 682, [1931] P. C. 182, 62 M. L. J. 163, 134 I. C. 333.

(52) *Anglo-Cuban Oil Co.* (supra). In this case a clause in the memorandum ran thus :  
 "Every sub-clause should be construed as a substantive clause and not limited or restricted by reference to any other sub-clause or by the name of the company and that none of such sub-clauses or the objects specified therein should be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause."

(53) *Taldua Rubber Co.* [1946] 2 A. E. R. 563.

(54) See notes to s. 433 (f) and *Amalgamated Syndicate* (supra).

(55) *Simpson v. Westminster Palace Hotel Co.* [1866] 8 H. L. C. 712; *Cotman v. Brougham* (supra) at p. 520.

(56) *Syam Chand v. Calcutta Stock Exchange Ltd.* [1949] C. 337, [1945] 2 Cal. 313.

mortgage, dispose of, turn to account or otherwise deal with all or any part of the property of the association." Held that this clause could not be regarded as an object at all and far less an independent object by itself. It was more in the nature of a power which was taken for the purpose of attaining the main and dominant objects for which the association was established.

Where the memorandum of association deals with the rights of various classes of shares, in order to ascertain the rights attaching to particular classes of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the statute, in which case that particular provision will be treated as invalid (57).

**167. Implied power of company :—**As regards the implied powers of a company, Lord Selborne, L. C. observed : "It appears to me that directors and general meetings of companies of this sort can have no powers by implication except such as are incident to, or properly to be inferred from, the powers expressed in the memorandum and articles. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted (58). The doctrine that a company can do nothing which is not expressly or impliedly provided by its memorandum of association must be reasonably understood and applied. A company therefore in carrying on the trade for which it is constituted and in whatever may be regarded fairly as incidental to or consequential upon that trade, is free to enter into any transaction not expressly prohibited by the memorandum (59). Thus a trading company has an implied power to borrow money (60), and to sell land (61), and in the latter case it can give mortgage also (62).

**168. Objects—not powers :—**It should be remembered that under this section the memorandum should state the *objects* of the company and not the *powers*. This is pointed out clearly by their Lordships in the case noted below (63) : "As Lord Wrenbury said in *Cotman v. Brougham* (64) : 'Powers are not required to be and ought not to be specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade'..... It must be borne in mind that the purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this information they are entitled to rely on the constituent documents of the company. They have not access to other sources of information such as antecedent transactions."

In this connection the following observation in the speech of Lord Parker of Waddington in *Cotman v. Brougham* (65) is instructive : "The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes for which their money can be applied. In the second place it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum

(57) *British India Corpn. v. Shanti Narain* [1935] A. 310, 57 All. 810, 156 L. C. 1088.

(58) *Oakbank Oil Co. v. Crum* [1882] 8 App. Cas. 65, 71.

(59) *Shamnagar Jute Factory v. Ram Narain* [1887] 14 Cal. 189; *Attorney-General v. Great Eastern Ry. Co.* [1880] 5 App. Cas. 473; *Deuchar v. Gas Light & Coke Co.* [1925] A. C. 691; *Egyptian Salt & Soda Co. v. Port Said Salt Assn.* (infra).

(60) *General Auction &c. Co. v. Smith* [1891] 3 Ch. 432.

(61) *Re Kingsbury Collieries* [1907] 2 Ch. 259.

(62) *Patent Fife Co.* [1870] 6 Ch. App. 83; see the judgment of Mellish, L. J. at p. 88.

(63) *Egyptian Salt & Soda Co. v. Port Said Assn.* [1891] A. C. 677 (P. C.) at pp. 683-84.

(64) [1918] A. C. 514 at p. 522.

(65) [1918] A. C. 514 at pp. 520-21.

the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover experience soon showed that persons to transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But even thus, a person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's prime or paramount object, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be *ultra vires*. At any rate, all the surrounding circumstances would require investigation. Fresh clauses were framed to meet this difficulty and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects, and its clauses to prevent any specified object being read as ancillary to some other objects."

**169. Acts *ultra vires* and *intra vires* :—**A company cannot confirm or ratify anything which is *ultra vires* (66). This term in its proper sense denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed, or the statutes which are applicable to it, or by its charter or memorandum of association. The term is often loosely used and applied to an act or transaction which is beyond the lawful powers of an individual.

Where an act is *ultra vires* of a company the consent, even of every member of it, cannot make it valid (67), as Lord Cairns clearly stated the law in the following passage : "If every shareholder of the company had been in the room, and every shareholder of the company had said 'that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing of the seal of the company', the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing" (66). Such an act cannot be validated by the assent of a general meeting of the shareholders (68), or by obtaining judgment by consent (69), or by estoppel (70).

On the other hand, a transaction which is beyond the powers of the directors only, may be ratified by an ordinary resolution of a general meeting, although to authorize such acts in the future an alteration of the articles by passing a "special resolution" is necessary (71). The doctrine of *ultra vires*, as explained in the last noted case, is to be maintained, but is to be applied reasonably so that whatever is fairly incidental to those things which the legislature has authorized ought not, unless

(66) *Ashbury Ry. Carriage Co. v. Riche* [1875] L.R. 7 H.L. 653, 672.

(67) *Baroness Wenlock v. River Dee Co.* [1883] 36 Ch. D. 675n. on appeal 10 App. Cas. 354; *Ashbury Ry. Carriage Co. v. Riche* (supra); *Towers v. African Tug Co.* (infra).

(68) *Towers v. African Tug Co.* [1904] 1 Ch. 558 (C. A.); *Ashbury Ry. Carriage Co. v. Riche* (supra).

(69) *Great N. W. Central Ry v. Charlebois* [1899] A. C. 114 (P. C.).

(70) *Bishop v. Balkis Consolidated Co.* [1890] 25 Q. B. D. 512; *British Mutual Banking Co v. Charnwood Forest Ry. Co.* [1886] 18 Q. B. D. 714; *Home & Foreign Investment Co.* [1912] 1 Ch. 72, 80.

(71) *Ashbury Ry Carriage Co. v. Riche* (supra) at p. 675.

expressly prohibited, to be held *ultra vires* (72). Where a company is formed for working a patented machine, it is not *ultra vires* to purchase the patent (73). The employment of police men by a company to protect its property is an act within the scope of its incorporation and thus is not *ultra vires* (74). Where a company was empowered by its memorandum and articles, in the widest terms, to undertake and to assist in the formation of other companies, and its managing director on its behalf applied for shares in a railway company, it was held that the taking of the shares by the company was not *ultra vires* and the company should be settled on the list of contributories (75).

No judgment founded on an *ultra vires* contract is inviolable unless it embodied a decision of a court on the issue of *ultra vires* or a compromise of that issue. Any compromise made on the footing that the contract was *ultra vires*, or any judgment in which the defence of *ultra vires* was not raised, could be set aside (76).

A company cannot purchase its own shares (77), or advance capital of the company to a director to do so (78), or accept surrender of its own shares except where it does not involve reduction of capital or does not amount to purchase of its own shares (79). It is *ultra vires* of a company to issue unauthorized capital, or reduce or repay capital without complying with the statutory requirements, or distribute bonus shares gratuitously, or issue shares at a discount (80), or pay dividends out of capital, or pay unreasonable sums for services rendered, or make payment for the benefit of a section of the shareholders, or subscribe to external objects (81).

Apart from any statutory powers, a company cannot employ its funds or assets for the purpose of any transaction which does not come within the objects specified in the memorandum of association. It cannot by its articles of association extend its powers in this respect (82). The purchase of shares of other joint stock companies, unless expressly authorized by the memorandum of association, is *ultra vires* (83) and the contract is not binding (84). It is not sufficient for the proposed transaction to be convenient, if it is not incidental to the objects stated in the memorandum (85). But if property is acquired by *ultra vires* expenditure, the company's rights over it may be protected (86). Although buying the shares of another company as a speculation would have been *ultra vires*, it was within the powers of a company as bankers to advance on the deposit of shares and to do all such acts as were reasonable and proper for making the security available (87). The chairman of a company with its assent held in his name shares in another company which had been purchased with the money of the first named company. The chairman became bankrupt: Held that though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct

(72) Attorney General v. Great Eastern Ry. Co. [1880] 5 App. Cas. 473.

(73) Liefchild's case [1865] 1 L. R. 1 Eq. 231.

(74) Edwards v. Midland Ry. Co. [1880] 6 Q. B. D. 287.

(75) International Contract Corp'n.'s case [1869] 20 L. T. 96.

(76) John Beauforte (London) Ltd. [1953] 1 A. E. R. 634.

(77) Trevor v. Whitworth [1888] 12 App. Cas. 109. See s. 77.

(78) Irish Prov. Assurance Co. [1913] 1 Ir. R. 352 (C. A.). See s. 77.

(79) Rowell v. John Rowell & Sons Ltd. [1912] 2 Ch. 609.

(80) Re Almada & Tiritto Co. [1888] 38 Ch. D. 415 (C. A.); Hongkong & China Gas Co. v. Glen [1914] 1 Ch. 527. But now see s. 79.

(81) Hals. (Hailsh.) p. 408.

(82) Trevor v. Whitworth (supra).

(83) William Thomas & Co. [1915] 1 Ch. 325 at p. 329; Jehangir v. Shamji [1868] 4 Bom. H.C.R. 185, (O.C.).

(84) Re European Society Arbitration Acts [1878] 8 Ch. D. 679 (C.A.).

(85) A. G. v. Mersey Railway [1907] A.C. 415.

(86) National Telephone Co. v. Constables of St. Peter Port [1900] A.C. 317.

(87) Asiatic Banking Corp'n. [1869] 4 Ch. App. 252.

(88). Where the memorandum or the articles give a limited power to borrow and mortgage its property, the company cannot borrow or mortgage beyond the limits set (89). A contract which is *ultra vires* is not necessarily illegal. Where a bank lent money on mortgage, it was held by the Madras High Court that the bank could sue on the contract, although the memorandum of association of the bank prohibited the bank from lending money on mortgage, on the ground that under the Indian law a mortgage is a transfer of interest in immovable property, and property legally and by formal transfer (as laid down by Brice on the Doctrine of *Ultra Vires*) or conveyance transferred to a corporation is in law duly vested in such corporation which was not empowered to acquire such property (90).

Where a deed of guarantee was entered into between a company, a guarantor and a trustee for the preference shareholders, whereby it was provided in clause 7 that any sum paid by the guarantor as dividend to the preference shareholders should be forthwith repaid to him by the company on demand, it was held that clause 7 was wholly *ultra vires* the company and void. "The instant that any sum is paid by the guarantor to the trustee for the preference shareholders, cl. 7 authorises the guarantor to commence action for repayment of the sum as if he were a creditor of the company entitled to rank in the same position as any other creditor. The capital of the company might thereby be reduced otherwise than by expenditure on the objects defined in the memorandum of association" (91). One limited company cannot stand guarantee for the contracts of another limited company without an express power given to the company, either in so many words or to be inferred from the general language used in the memorandum of association (92).

In the absence of a special power in the memorandum it is *ultra vires* of a company to take shares in another company carrying on a different class of business, or for one company to amalgamate with another company, or for a company with powers to lend to guarantee the debts of a company promoted by it, or for a railway company to carry on an omnibus business (93).

On the other hand, it is not *ultra vires* of a company to pay pension to the family of a deceased officer or gratuities to its servants, to pay a reasonable brokerage for selling its shares, to take a larger house than what is necessary and sublet a portion. A trading company may borrow on or without security or accept bills of exchange or deposit its title deeds to secure an overdraft, or issue debenture stock as collateral security. A colliery company can purchase a colliery or sell land to a builder for the erection of cottages. A company whose powers include that of promoting may promote another company, subscribe for the shares and pay the expenses of promotion (94).

The object clause 3 (g) (3) of the memorandum of a shipping company provided as follows: "To acquire and deal with the property following: Plant, machinery, personal estate and effect"; and clause 3 (h) (7) provided: "To perform or do all or any of the following operations, acts or things: To lend money with or without security, and to invest money of the company in such manner..... as the directors think fit". The company by its directors bought gold and silver and kept the same with the Imperial Bank of India for safe custody. It was held that the company's

(88) *Great Eastern Ry. Co. v. Turner* [1872] 8 Ch. App. 149.

(89) *Baroness of Wenlock v. River Dee Co.* [1885] 10 App. Cas. 354.

(90) *Ahmed Said v. Bank of Mysore* [1930] M. 512, 53 Mad. 771, 59 M.L.J. 28, 126 I.C. 612.

(91) *Walter's Deed of Guarantee* [1933] 118 L.T. 473.

(92) *Sree Minakshi Mills v. Ratilal* [1941] B. 108, 43 Bom. L.R. 53 [in this case the words were held to be sufficiently wide to enable the company to enter into a contract of guarantee (at p. 117)].

(93) For cases and other instances see Hals. (Hailsh.) pp. 405-406. See s. 17.

(94) For cases see Hals. (Hailsh.) p. 406 and Palmer, 13th ed., pp. 62-63 and Buckley, 10th ed., p. 11. As to cases where employment of a company's fund or property has been held to be *intra vires* the company see Palmer, 13th ed., p. 62.

act was *intra vires* and came within clause 3 (g) (3) (95). It was further held in the last cited case by Stone, C. J. (*Kania, J. contra*) that the action was not an investment within cl. 3 (h) (7). "It does not seem to me", said Stone, C. J. at p. 133, "that a company can be said to make an investment or to have invested its money, when what the company has done is to change its surplus money into a commodity which it locks up in safe custody, which produces no dividend or income, and in respect of which the company hopes and intends that it will remain unscathed by the fortunes of war and the fluctuations of the market, so that at some future date the money which it represents may be profitably laid out in some form of enterprise."

Where a company is given by its memorandum express power to purchase land, it is implied that it has power to let the land, and if necessary also to sell it (96). A company has large powers of selling its personal property as incidental to the management of its business (97); but a power to sell or purchase the business of another company will not be implied (98). Although a company cannot confirm or ratify anything which is beyond its powers, part of it may be valid if severable from that which is void (99). Negotiation of negotiable instruments is within the ordinary course of business of a company, and no special power is necessary for the purpose (1). But a company may make bills of exchange and promissory notes for the purpose of obtaining credit, if it is authorized by the memorandum of association or if its business is such as to make the use of bills necessary and not otherwise (2). The company is liable to a *bona fide* holder of the bill if it is signed by some one having apparent, though not actual, authority (3). Where a bill is made by the directors without authority, they will be personally liable to a *bona fide* holder (4). A company can raise money by the issue of debentures and invest the same or any part of it, if the memorandum so authorizes it (5).

Payment to a retired secretary and member of a club by way of annuity, pension or gratuity is within the powers of the club, although according to the memorandum of association the club is not for gain and no dividend, bonus etc., are to be paid by way of profit to the members (6). But it has been held that granting pension to the widow of a former managing director is *ultra vires*, although the articles of the company authorized the directors to provide for the welfare of employees, their widows and children (7). Where a company was formed to acquire business of chemical manufacture, a large sum of money was allowed to be distributed for the furtherance of scientific education and research on the ground that such distribution was likely to lead to direct and substantial (but not speculative or too remote) advantage of the company (8).

In this connection see Act XXXVII of 1940 authorizing companies, as from 31d September, 1939, to make donations in a Government loan for the purpose of assisting the prosecution of the last war notwithstanding that the memorandum or articles of association of such companies did not enable them to do so.

(95) *Wamanlal v. Scindia Steam Navigation Co.* [1944] B. 131, 46 Bom. L.R. 145.

(96) *Gujrat Ginning & Manfg. Co. v. Motilal H. S. Weaving Co.* [1930] B. 84, 53 Bom. 792, 31 Bom. L.R. 1310; see also *Moore's Contract* [1907] 2 Ch. 259.

(97) *Wall v. London N. A. Corporation* [1898] 2 Ch. 469 (C.A.).

(98) *Re European S. Arbitration Act* (supra).

(99) *Wall v. London N. A. Corporation* [1898] 2 Ch. 469, (C.A.).

(1) *Choonilal v. Spence's Hotel Co.* [1868] 1 B.L.R. (O.S.) 14.

(2) *Peruvian Railways Co. v. Thames & M. M. Insee. Co.* [1867] 2 Ch. App. at pp. 617, 622.

(3) *Dey v. Pullinger Engineering Co.* [1921] 1 K.B. 77.

(4) *West L. C. Bank v. Kitson* [1884] 13 Q.B.D. 360.

(5) *Imperial Bank of India v. Bengal National Bank* [1930] C. 536, 57 Cal. 328.

(6) *Cyclists' Touring Club v. Hopkinson* [1910] 1 Ch. 179; see also *Normandy v. Ind. Coope & Co.* [1908] 1 Ch. 84 at p. 104.

(7) *Lee, Behrens & Co. Ltd.* [1932] 2 Ch. 46.

(8) *Evans v. Brunner, Mond & Co.* [1921] 1 Ch. 359.

If the directors carry on a trade which is *ultra vires* of the company, they cannot bind the company by the contracts, and the consignees cannot recover in respect of their shipments (9). If the directors misapply the capital of the company to a purpose which is *ultra vires*, they are liable to replace it (10). It has been held in the last noted case that s. 10 of the Limitation Act does not apply to directors. A *bona fide* compromise of a reasonable claim by payment of a sum of money out of the company's capital is not *ultra vires* (11).

A mortgage of uncalled capital is allowable where the memorandum of association gives the power and there is nothing in the articles to the contrary (12); but where the memorandum, while authorizing certain charges, omits to authorize a charge on uncalled capital, the omission may imply a prohibition (13). A reserve fund created out of undivided profits is not capital (14), and it is not *ultra vires* of a company to purchase thereby shares of other companies, if the articles of the former so permit (15).

For cases illustrative of *ultra vires* transactions, see Part I of Palmer's Company Precedents, 15th ed. (1938), pp. 431-432.

**170. Borrowing:**—Where the bond given by the directors was not incidental to the conduct of the Building Society's business and the transaction was not authorized by its rules, it was held to be *ultra vires* (16). Persons who had lent money to the directors of a building society, which was employed in a loan to another society, could not enforce their claim in the winding up of the society (17). Where a loan is *ultra vires* of a company, the lender, whose money has been used to pay off the unauthorized loan, stands in the shoes of and can enforce the remedies of those whose loans were so satisfied (18). Although the borrowing be *ultra vires* of a company, the lender may, in its voluntary winding up, rank as a creditor for the amount of the loan under the equitable doctrine of subrogation if the moneys borrowed were applied in payment of the legitimate trading debts of the company (19). When an agent borrows money for a principal without the authority of the latter, but the principal takes the benefit of the money so borrowed or the money so borrowed has gone into the coffers of the principal, the law implies a promise to pay. There appears to be nothing in law which makes this principle inapplicable to the case of a joint-stock company when the borrowing power of the company is unlimited. The position would be that the principal (the company) through its agents (the directors or the managing agents) had borrowed money which the principal had not authorized the agents to borrow. However the money having been borrowed and used for the benefit of the principal, either in paying its debts or for its legitimate business, the company cannot repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. When these facts are established, a claim on the footing of money had and received would be maintainable (20).

- (9) Port Canning Co. [1871] 7 B.L.R. 853.
- (10) Kathiwar Trading Co. v. Virchand [1894] 18 Bom. 119.
- (11) Irish Provident Assurance Co. [1913] Ir. R. 352 (C.A.); Bath's case [1878] 8 Ch. D. 334.
- (12) Phoenix Bessemer Co. [1875] 44 L.J. (Ch.) 683, 32 L.T. 854; Newton v. Anglo-Australian Co. [1895] A.C. 244 (P.C.).
- (13) Newton v. Anglo-Australian Co. (supra) at p. 249.
- (14) Verner v. General & C. I. Trust [1894] 2 Ch. 239.
- (15) Ariff v. Suratee Barabazar Co. [1919] 49 I.C. 288.
- (16) Small v. Smith [1884] 10 App. Cas. 119.
- (17) Daves' case [1871] L.R. 12 Eq. 516.
- (18) Reversion Fund & Insurance Co. v. Maison Cosway Ltd. [1913] 1 K.B. 364; Harria Calculating Machine Co. [1914] 1 Ch. 920.
- (19) Per Eve J. in Airdale & Co. Society [1933] 1 Ch. 639.
- (20) T. R. Pratt (Bombay) Ltd. v. F. D. Sassoon & Co., Ltd. [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.



Where the carrying on of a business by a company is *ultra vires*, that *ultra vires* transaction creates no debt, legal or equitable, and upon winding up of the company the contributories are not liable to pay such debts (21). A company can retain property paid for by it or recover money paid by it, although the purchase or loan was *ultra vires* (22). But see *Mathura Mohan v. Ram Kumar* (1915) 43 Cal. 790 where it has been held that a corporation receiving money or property upon agreement which turns out to be *ultra vires* or illegal, is not entitled to retain the money. As to the persons who are competent to bring a suit in respect of *ultra vires* acts, see notes to s. 3 (1) (i) "company."

**171. Ratification :—**A company cannot confirm or ratify anything which is beyond its powers, express or implied, in the memorandum or conferred by the statute. Short of that, a transaction of the directors which is beyond their own powers, but within the powers of the company, can be ratified by a resolution of the company in a general meeting or even by acquiescence, provided that the shareholders have knowledge of the facts relating to the transaction to be ratified or the means of knowledge is available to them. A company may by a resolution at a subsequent meeting ratify any business which it purported to transact at a meeting informally called (23). In order to establish a case of ratification, it is essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further, after notice of that fact, the party consciously by an overt act agreed to be bound by it or, by acquiescence in the situation arising thereafter, allowed the business to continue. In either event consciousness of the act done by the agent without authority must be proved, and secondly it should be proved that after notice of such unauthorized act, the principal adopted the transaction (24). An incorporated company can ratify a tort committed by its agents (25). For other cases on *ultra vires* acts see notes to s. 46 and s. 100. See Notes 310 and 313.

A company cannot ratify or adopt a contract entered into by a person on its behalf before its incorporation, though it may enter into a new contract embodying the terms of the old one or adopting the old contract (26). See notes to s. 149 *post*.

**172. Estoppel :—**"It is well established," observed Cave J., "that a corporate body cannot be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done" (27). A company is not estopped from saying that the contract entered into by it was *ultra vires*. Nor can a representation by its officers that certain shares were being purchased for one of its constituents estop the company from pleading that the shares were purchased for itself and the purchase being of its own shares was *ultra vires* (28).

**173. Intra vires :—**A company is however bound in a matter *intra vires* the company by the unanimous agreement of all the corporators. If all the individual

(21) *Madras N. P. Fund Ltd.* [1931] M. 792, 60 M.L.J. 270, 133 I.C. 278.

(22) *Birkbeck P. B. B. Society* [1912] 2 Ch. 183 at p. 232, 'on appeal *sub nom.* *Sinclair v. Brougham* [1914] A.C. 398; *Great Eastern Ry. v. Turner* [1873] 8 Ch. App. 149; see also *Cunliffe, Brooks & Co. v. Blackburn B. B. Society* [1884] 9 App. Cas. 857, on appeal from *Blackburn B. B. Society v. Cunliffe Brooks & Co.* [1882] 22 Ch. D. 61.

(23) *Bhujekar v. Shinkar* [1934] B. 243, 36 Bom. L.R. 483, 151, I.C. 1082; see also *Hindusthan Assurance & Co. Society v. Khalsa Bank* [1928] L. 176, 9 Lah. 360, 108 I.C. 49.

(24) *T. R. Pratt (Bombay) Ltd. v. E. D. Sassoon & Co.* (*supra*).

(25) *Carter v. Mary Abbots Vestry* [1900] 64 J.P. 548; cf. *Hooke v. Speak* [1904] 2 Ch. 732.

(26) *Surendro & Co. v. Punjab Tannery Co.* [1923] L. 100, 68 I.C. 789.

(27) *Ex. p. Watson* [1881] 21 Q.B.D. 301.

(28) *Subaratnam v. O. J. Travancore N. & Q. Bank* [1943] M. 111 (116), 55 M.L.W. 658.

corporators in fact assent to a transaction that is *intra vires* the company, but *ultra vires* the board of directors, it is not necessary that they should hold a meeting in one room or at one place to express that assent simultaneously (29).

For cases illustrative of *intra vires* transaction see pp. 432-435 of Part I of Palmer's Company Precedents, 15th ed. (1958).

**174. Objects must not be illegal :—**The objects of a company must not be illegal or include anything in contravention of the Act (30), for instance, the issuing of its shares at a discount (31). The distribution of the assets in a liquidation cannot be defined by the memorandum so as to deprive the shareholders of the rights given them by the Act (32). The sale of all a company's assets and all its undertakings and distribution of the proceeds could not be a corporate object, so that under a clause for that purpose, introduced into the memorandum of association, such a sale and distribution could be made without regard to the provision of s. 208-C of the previous Act (32). But see now cl. (f) of sub-s. (1) of s. 17.

Where the objects do not include the return of a portion of the share capital to the shareholders in the shape of what is termed 'dividend', the articles providing for such return are *ultra vires*, being contrary to the objects clause of the memorandum of association (33).

Where the object of a company was "to advance money at interest on the security of land, houses, machinery and other property situated in India and to invest money not immediately required upon such securities and bank deposits as may be from time to time determined", a member of the company was held to be entitled to a declaration that advance of money in the nature of loans should only be made on the security of land, houses, machinery and other property situated in India, but that so far as the investment of money not immediately required was concerned, the directors had complete discretion in the matter of approving the kind of security offered (34).

**175. Injunction :—**A member of a company is not entitled to an injunction to restrain it from carrying out an object set forth in its memorandum of association (35). If the act is only voidable and not void, a shareholder has no right to injunction (36). A bona fide transaction with a company, impeachable on the ground of being *ultra vires*, will be set aside only on the terms that both parties be restored to their original position (37).

**176. Clauses of memorandum :—**For clauses commonly found in the memorandum of association, see Palmer's Company Law, 13th ed., pp. 59-61. Additional provisions may be inserted in the memorandum, but if inserted without qualification, they became conditions of the company's constitution, and the rule was that such condition could not be altered and that nothing could be done in contravention thereof (38). But see now s. 16. If the memorandum qualifies the provisions e.g., by giving power to alter them, that power may be exercised (39). Where a company puts in the forefront of its memorandum of association a special object and

(29) *Parker & Cooper Ltd. v. Reading* [1926] Ch. 975; *George Newman & Co.* [1895] 1 Ch. 674, 684, 686; see also *Express Engineering Works* [1920] 1 Ch. 466, 470.

(30) *Bowman v. Secular Society* [1917] A.C. 406.

(31) *Ooregum Gold Mining Co. v. Roper* [1892] A.C. 125. But now see s. 79.

(32) See *Bisgood v. Henderson T. Estates* [1908] 1 Ch. 743, overruling *Cotton v. Imperial &c. Corporation* [1892] 3 Ch. 454.

(33) *Guinness v. Land Corporation of Ireland* [1883] 22 Ch. D. 349.

(34) *Bharat Insurance Co. v. Kanhaya Lal* [1935] L. 792, 160 I.C. 24.

(35) *McGlade v. Royal L. M. Insurance Society* [1910] 2 Ch. 169.

(36) *Finance & Issue Ltd. v. Canadian Produce Corp'n.* [1905] 1 Ch. 37.

(37) *Irish P. Assurance Co.* [1913] Ir. R. 352 (C.A.).

(38) *Ashbury v. Watson* [1885] 30 Ch. D. 376.

(39) *Welsbach I. Gas Co.* [1904] 1 Ch. 87.

the subsequent clauses contain a list of general objects, the objects first stated may be considered as the permanent objects of the company and the other objects as ancillary and subservient to that object (40).

There is no rule of law that requires any company or other association to fulfil each and every separate purpose for which it was originally formed (41).

In *Oakhbank Oil Co. v. Crum* (42), Lord Selborne observed : "It appears to me that directors and general meetings of companies of this sort can have no powers by implication, except such as are incident to, or properly to be inferred from, the powers expressed in the memorandum and articles. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted."

Where a company is not bound by a contract, it does not become bound for the fact that it acts under the mistaken belief that it is bound (43).

Shareholders in general meetings cannot authorize application of the company's funds in subscription for public objects, unless power has been taken in the memorandum (44). Payments might however be made for matters that are reasonably incidental to or consequential on the business authorized by the memorandum, e.g., expenses of its incorporation (45), liquidation (46), or those of stamping and posting proxy papers (47). As regards the last item, see now sub-s. (4) of s. 176.

**177. Limited liability** :—This means that the liability of the members is limited to the amount payable on the shares. They are not bound to pay more even if the company contracts enormous debts.

**178. "Share capital"** :—The words "share capital" are used in contradistinction to borrowed money. The capital is not a debt of the company even to its shareholders (48).

**179. "Nominal capital"** :—The nominal capital is the amount which limits the potentiality of a company to issue the shares into which the capital is divided. When some of the "nominal" capital is subscribed, it at once becomes "issued" capital, the residue being "unissued" capital (49).

**180. "Paid up capital"** :—The aggregate amount of payments of application moneys, allotment moneys and calls represents the "paid up" capital. Shares may be lawfully issued as "fully paid up" for consideration which the company has agreed to accept, as representing the money's worth, whether the shares are or are not the shares subscribed for in the memorandum of association (50).

**181. "Fixed amount"** :—The "fixed amount" of a share must be a monetary amount, but it is not necessary that all the shares should be of the same amount. A capital of say Rs. 1,00,000 may be divided into 5,000 shares of Rs. 10 each and 500 shares of Rs. 100 each (51).

**182. "Fixed" and "circulating capital"** :—The "fixed capital" of a company is what the company retains in the shape of assets upon which the subscribed

(40) *Coolgardie C. G. Mines* [1897] 76 I.T. 269.

(41) *Thekison v. Valentina* [1906] 1 Ch. 480.

(42) [1883] 8 App. Cas. 65.

(43) *Northumberland A. Hotel Co.* [1886] 33 Ch. D. 16; *Bagot P. T. Co. v. Clipper P. T. Co.* [1902] 1 Ch. 146, [1901] 1 Ch. 196.

(44) *Tomkinson v. South Eastern Ry.* [1887] 35 Ch. D. 675.

(45) *Abstainers & General Insurance Co.* [1891] 2 Ch. 124.

(46) *Bishop v. Smyrna & Cassaba Ry. Co.* [1895] 2 Ch. 265.

(47) *Peel v. London & N. W. Ry.* [1907] 1 Ch. 5 (C.A.).

(48) *Verner v. General & C. I. Trust* [1894] 2 Ch. 239 at p. 264; *Lee v. Neuchatel Asphalt Co.* [1889] 41 Ch. D. 1.

(49) *Whitehead & Brothers, Ltd.* [1900] 1 Ch. 804.

(50) *De Beville's case* [1868] L.R. 7 Eq. 11.

(51) See Hals. (Hailsh.) p. 153.

capital has been expended, and which assets, either themselves produce income independent of any further action of the company, or being retained by the company are made use of to produce income or gain profits. The "circulating capital" of a company is a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets which, or the proceeds of which, are intended to return to the company with an increment and to be used again and again and always returned with accretions. When circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against or deducted from receipts before the amount of any profit can be considered (52). Lord Hanworth, M.R., observed in the undernoted case (53): "It seems rather that the cases of *Hancock* (54) and of *Mitchell v. B. W. Noble Ltd.* (55), and of *Mallet v. Staveleg* (56), give illustrations that the test of fixed and circulating capital is the true one; and where, as in this case, the expenditure is to bring back into the hands of the company a necessary ingredient of their existing business—important but still ancillary and necessary to the business which they carry on—the expenditure ought to be debited to the circulating capital, which is employed in and sunk in the permanent—even if wasting—assets of the business."

**183. Different classes of shares:**—Although by clause (a) of sub-s. (4) "the memorandum of association is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles rather than by the memorandum of association and are therefore matters which [unless provided by the memorandum, as in *Ashbury v. Watson* (57)], may be determined by the company from time to time by special resolution" (58). But see now ss. 85, 86 and 94. If however the memorandum defines the respective rights, they cannot subsequently be varied (57) without the sanction of the Court in a proceeding under s. 391 *et seq.*, or under ss. 106 and 107 unless the memorandum also confers power to alter such rights (59). It was common to declare the rights, privileges and conditions of preference shares and founders' shares by express provisions in the memorandum of association, for by so doing extra protection was secured to the holders of such shares against any alteration of their status. But all this can be done and more properly done by the articles of Association (60). The law in this regard has been clearly laid down by the Judicial Committee in a recent case thus (61): While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and the rights to be attached to them is more properly made by the articles, which may be altered from time to time by special resolution. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the articles. If nothing is said in the memorandum, the articles may provide for the issue of the authorized capital in the form of preference shares; if the articles do not so provide or do provide for equality *inter socios*, the power to issue preference

(52) Per Swinfen Eady, L. J. in *Anmonia Soda Co. v. Chamberlain* [1918] 1 Ch. 266.

(53) *Anglo Persian Oil Co. v. Dale* [1932] 1 K.B. 124.

(54) [1919] 1 K.B. 25.

(55) [1927] 1 K.B. 719.

(56) [1928] 2 K.B. 405.

(57) [1885] 30 Ch. D. 376; see also *E. D. Sassoon United Mills* [1929] B. 38, 30 Bom. L.R. 598, 110 I.C. 649.

(58) *Andrews v. Gas Meter & Co.* [1897] 1 Ch. 361.

(59) See *Underwood v. London Music Halls* [1901] 2 Ch. 309; *Welsbach I. G. Light Co.* [1904] 1 Ch. 87.

(60) *Palmer's Company Law*, 12 ed. p. 28.

(61) *Campbell v. Rofe* [1933] P.C. 39, 141 I.C. 526.

shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution (62). A company is entitled to exercise the powers conferred on it by the memorandum, unless such right is clearly restricted by the articles (63). See now s. 16.

**184. Specification of rights in memo. or articles :—**Specification in the memorandum of rights attached to a particular class of shares was regarded *prima facie* as one of the conditions referred to in s. 10 of the previous Act and therefore made unalterable (64); but if the rights were only conditionally attached, *e.g.*, if they were accompanied by a clause providing for alteration, such specification did not take effect as an unalterable condition (65). See now s. 16.

If the memorandum is wholly silent on the point, the articles as originally framed and registered can effectually divide, or give power to divide, the capital into different classes of shares with preferential or other rights attached (66). If the rights of different classes of shareholders are fixed by the articles only, they can be altered by special resolution without leave of the Court (67).

When both the memorandum and the articles are silent, a company can issue different classes of shares by taking powers on alteration of the articles (68).

**185. Rights of preference shareholder :—**The holders of preference shares, unless the articles expressly so provide, are not entitled to more than their fixed dividend, however prosperous the company may be (69). Preference shares are presumably cumulative, and ambiguous or vague language in the articles will not make them non-cumulative (70). They may however be made non-cumulative if the articles so declare in clear language (71). If the shareholders are by the articles entitled only to dividends when declared, a preference shareholder cannot after liquidation claim payment on the ground that a dividend might have been declared (72).

Unless preference shares are made preferential as to capital, they are paid off equally with the ordinary shares upon liquidation of the company (73). But if they are preferential as to capital, any surplus assets after payment of the debts will, apart from any special provision in the articles (74), be applied first in paying off the capital of the preference shares (75).

If the memorandum or the articles declare that the preference shares shall confer

- (62) *Campbell v. Rofe* (supra) at p. 98; also *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361; *British & American T. & F. Corpn. v. Couper* [1894] A.C. 399.
- (63) *Campbell v. Rofe* (supra) at pp. 98-99.
- (64) *Ashbury v. Watson* [1885] 30 Ch. D. 376.
- (65) *Welsbach I. G. Light Co.* (supra); see also *Underwood v. London Music Halls* (supra).
- (66) *Harrison v. Mexican Ry. Co.* [1875] 19 Eq. 358; *South Durham Brewery Co.* [1886] 31 Ch. D. 261.
- (67) *Australian Estate &c. Co.* [1910] 1 Ch. 414.
- (68) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361; see also *Chithambaram v. Krishna* [1910] 33 Mad. 36.
- (69) *Will v. United Lankat Plantation* [1914] A.C. 11.
- (70) *Foster v. Coles* [1906] 22 T.L.R. 555.
- (71) *Staples v. Eastman Photo Co.* [1896] 2 Ch. 303; see *Adair v. Old Bushmills Co.* [1908] W.N. 24.
- (72) *Odessa Waterworks Co.* [1901] 2 Ch. 190n.
- (73) *Madame Tussaud & Sons* [1927] 1 Ch. 657.
- (74) As in *W. J. Hall & Co.* [1909] 1 Ch. 521.
- (75) *Gore-Browne*, 56th ed. p. 29; see *Espuela Land and Cattle Co* (infra); *Will v. United Lankat Plantations* (supra); *National Telephone Co.* [1914] 1 Ch. 755, and *Fraser & Chalmers, Ltd.* [1919] 2 Ch. 114.

a preference in the winding up, or that the surplus assets (76) shall be applied first in repaying the preference shares, but do not further deal with the capital, there is a difference of judicial opinion in England as to whether the preference shareholders will participate in any surplus after repayment of the ordinary shares (77). If the preference capital is repayable with interest, this means with interest from the date of the winding up, and any surplus from the sale of assets will be treated as capital (78).

Where a clause in the memorandum of association conferred on the preference shareholders "the right to a fixed cumulative preference dividend at the rate of 12 per cent. per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits which in respect of each year shall remain after paying or providing for the payment of dividend for such year at the rate of 10 p.c. per annum on the capital for the time being paid up on the ordinary shares" and provided that their "shares shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets," it was held on the construction of the memorandum and articles that the preference shareholders were entitled, in priority to the ordinary shareholders, to payment of arrears of fixed cumulative preferential dividend and to repayment of capital. Every case depends upon the particular language used (79).

Where the articles state that the preference shareholders are to be paid in a winding up "arrears of the preference dividend", there will be no such arrears if the preference dividend was payable out of the profits of each year and there were no profits before the winding up (80); but the question is doubtful if the dividend is cumulative (81). It has however been held that profits earned after commencement of winding up are divisible as capital (82).

If the shares are issued as preference shares when there is no power to do so, or in an irregular manner, the subscribers are entitled to have their money paid back and are regarded as creditors of the company (83).

**186. Memo. and articles of company limited by guarantee :—**For forms of memorandum and articles of association of a company limited by guarantee, see Tables C and D of the First Schedule. The articles of such company must be registered with the memorandum and must state the amount of the share capital or, if the company has no share capital, the number of members with which the company is proposed to be registered (84). For the liability of a member of such a company in the winding up, see s. 426, sub s. (2). A member may be sued for the amount for which he is liable under the articles; he is not liable as a contributory in respect of such a sum (85).

The amount of guarantee of a company limited by guarantee is in the nature of reserve capital and cannot be mortgaged or charged before liquidation, but remains available for paying the costs of winding up and the general liabilities of the company (86).

(76) "Surplus assets" means the surplus after payment of outside liabilities and repayment to the shareholders of capital paid (*Ramel Syndicate* [1911] 1 Ch. 740).

(77) See note (75) supra and *Palmer's Company Precedents*, 15th ed. (1958), Part 1, pp. 773-74 and the cases cited there.

(78) *Anglo-French Music Co.* [1921] 1 Ch. 386; *W. J. Hall & Co.* [1909] 1 Ch. 521.

(79) *Walter Symons Ltd.* [1934] Ch. 308.

(80) *Espuela Land & Cattle Co.* [1909] 2 Ch. 187.

(81) *Gore-Browne*, 36th ed. pp. 28-29.

(82) *Bishop v. Smyrna & Cassaba Ry. Co.* [1895] 2 Ch. 596.

(83) *Cf. Home & Foreign Investment Co.* [1912] 1 Ch. 72.

(84) SS. 26 and 27.

(85) *Baird's case* [1899] 2 Ch. 593.

(86) *Irish Club Co.* [1906] W.N. 172.

The past members of such a company are liable to be put on the "B" list (87). Notice of any increase of capital or in the number of members of a company limited by guarantee must be sent to the Registrar (88).

**187. Memorandum and articles of an unlimited company :—**For forms of memorandum and articles of association of an unlimited company see Table E of the First Schedule. As to what the articles of such a company should contain see s. 26 and s. 27 (1).

In the case of an unlimited company, the capital being stated in the articles may be varied at any time by special resolution without the sanction of the Court; and if the articles allow it, capital may be returned to the members and they may cease to be members on such terms as may be agreed (89).

As in the case of a company limited by guarantee, notice of any increase of capital or in the number of members must be sent to the registrar (90).

**188. Winding up and alteration of memo. :—**The High Court has jurisdiction to wind up a registered unlimited company which has no shares and no capital, and therefore it has jurisdiction to sanction an alteration of its memorandum of association (91).

**14. Form of memorandum.—**The memorandum of association of a company shall be in such one of the Forms in Tables B, C, D and E in Schedule I as may be applicable to the case of the company, or in a Form as near thereto as circumstances admit.

This section has been inserted by the Joint Committee with the following observation:—"The best place for a provision that the model forms of memoranda of association set out in Schedule I should be adopted by companies as far as possible is in this part of the Bill which deals with the memorandum of association, and not in original clause 595" (*Vide* J.C.R., para 14).

For the form of memorandum of association of a company limited by shares, see Table B; for the forms of memorandum and articles of association of a company limited by guarantee and not having a share capital, see Table C; for the forms of memorandum and articles of association of a company limited by guarantee and having a share capital see Table D; and for the forms of memorandum and articles of association of an unlimited company, see Table E—all in the First Schedule of the Act.

**15. Printing and signature of memorandum.—**The memorandum shall—

- (a) be printed,
- (b) be divided into paragraphs numbered consecutively, and

(87) Premier Underwriting Assn. [1913] 2 Ch. 29.

(88) S. 97.

(89) Borough Commercial & Building Society [1893] 2 Ch. 242.

(90) S. 97.

(91) North of England I. S. Insurance Co. [1900] 1 Ch. 481.

(c) be signed by each subscriber (who shall add his address, description and occupation, if any,) in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

This corresponds to s. 9 of the old Act and s. 3 of the English Act of 1948—*Notes on Clauses*.

At the end of cl. (c) the words "and shall likewise add his address, description and occupation, if any" have been added by the Lok Sabha.

This section provides that like the articles (see s. 30 *post*) the memorandum should be divided into paragraphs numbered consecutively, and printed. The address, description and occupation, if any, of the subscribers should also be added.

**189. Attestation of signature** :—One witness for all the subscribers will suffice (92). But the signature of a subscriber cannot be attested by himself or by another subscriber, for the word "attest" implies "presence of some person who stands by, but is not a party to the transaction" (93). As observed by Erle C. J. "The expression 'an attesting witness' may be taken to imply that there is one person executing the deed and another distinct person attesting that completed execution" (94).

**190. Who may sign** :—An agent may sign the memorandum of association on behalf of his principal, and the authority to sign may be given orally (95). The execution will be good whether the agent simply writes his principal's name or adds words showing that it is signed by an attorney (96).

**191. Liability of the signatory** :—A signatory to the memorandum is responsible for the shares which are shown against his name in the memorandum, and on liquidation he is liable to the full extent, even if the shares were never formally allotted to him (97). He remains a member until such time as he validly surrenders the shares or validly transfers them (98).

After registration a subscriber to the memorandum cannot divest himself of his liability as a member, although his signature may not have been properly attested; the transaction may be irregular, but it is not void (96). The subscriber cannot repudiate his subscription on the ground that he was induced to sign by misrepresentation (99). As to the effect of registration, see ss. 34 and 35.

**192. Stamp and fees** :—As to the stamp on a memorandum of association see Appendix (Stamp Duty). The stamp must be affixed before or at the time of signature (1). As to the scale of fees, see Schedule X of the Act.

**16. Alteration of memorandum.**—(1) A company shall not alter the conditions contained in its memorandum except in the cases, in the mode, and to the extent, for which express provision is made in this Act.

(92) Palmer's Company Law, 13th ed. p. 30.

(93) Per Lord Selborne in *Seal v. Claridge* [1881] 7 Q.B.D. 516 at p. 519.

(94) *Defell v. White* [1866] L.R. 2 C.P. 144 at p. 146; see also *Re Parrott* [1891] 64 L.T. 801.

(95) *Whitley Partners* [1886] 32 Ch. D. 337.

(96) *Chotalal v. Dalsukhram* [1893] 17 Bom. 472.

(97) *Mirza Ahmed* [1924] M.W.N. 582, 83 I.C. 94.

(98) *U. P. Oil Mills Co.* [1931] A. 701, 133 I.C. 424.

(99) *Lord Lurgan's case* [1902] 1 Ch. 707.

(1) S. 17, Stamp Act, 1899.



(2) Only those provisions which are required by section 13 or by any other specific provision contained in this Act, to be stated in the memorandum of the company concerned shall be deemed to be conditions contained in its memorandum.

(3) Other provisions contained in the memorandum, including those relating to the appointment of a managing director, managing agent, secretaries and treasurers or manager, may be altered in the same manner as the articles of the company, but if there is any express provision in this Act permitting of the alteration of such provisions in any other manner, they may also be altered in such other manner.

(4) All references to the articles of a company in this Act shall be construed as including references to the other provisions aforesaid contained in its memorandum.

**192A.** :--Sub-s. (1) corresponds to s. 10 of the previous Act and s. 4 of the English Act of 1948. Sub-s. (2) brings out the intention quite clearly. Sub-s. (3) corresponds to the Proviso to s. 10 of the old Act. It has been generalised, so as to refer to everything, which need not be included in the memorandum - *Notes on Clauses*. The reference in sub-s (3) to managing agent or manager follows the decision of the Bombay High Court in *Ramkumar v. Sholapur Spinning & Weaving Co.* (2).

In sub-s. (3) the words "secretaries and treasurers" have been introduced by the Joint Committee.

**193. Condition was not alterable** :- As observed by Lord Justice Baggallay, "the memorandum of association forms indeed the charter of the company, to be modified only in the way provided by the statute" (3). A condition contained in a company's memorandum of association could not be altered and nothing could be done in contravention thereof (4). If the memorandum qualified the provisions, for instance, by giving power to alter them, that power might however be exercised (5). Where one of the conditions contained in the memorandum of association was that the rights and privileges given to the various classes of shares were subject to variation, varying them did not amount to an alteration of the conditions contained in memorandum (6). Where the articles were registered on the same day as the memorandum and the reference in a clause of the memorandum to the "privileges, rights, restrictions and conditions specified in the articles" obviously meant the contemporaneous articles which were registered on the same day, it was held that the rights, privileges and restrictions of the preference shareholders as defined in the articles should be treated as incorporated in the memorandum, and so could not be altered (7).

**194. Meaning of condition** :- It was held under the old Act that the word "conditions" was general, and was not restricted to conditions required by the statute to be inserted in the memorandum. If conditions, not required to be inserted, but in the sense of forming part of the constitution of the company, were

(2) [1934] B. 427, 36 Bom. L.R. 907.

(3) *Ashbury v. Watson* [1885] 30 Ch. D. 376, 380 81.

(4) *Ashbury v. Watson* [1885] 30 Ch. D. 376.

(5) *Welsbach Incandescent Gas Co.* [1904] 1 Ch. 87.

(6) *British India Corpn. v. Shanti Narain* [1935] A 310, 57 All. 810, 156 I.C. 1088.

(7) *Collins v. Brimingham Breweries Ltd.* [1899] 15 T.L.R. 180.

inserted in the memorandum; they were unalterable (8), unless the memorandum reserved power to alter them (9). But if the memorandum appoints a director without mentioning anything about his qualification, the company may afterwards impose a share qualification (10). A company was registered under Act VI of 1882 with the following words in the memorandum: "The registered office of the company will be situated in the town of Sikhar:" held, the insertion of a place name in the memorandum of association does not make it an unalterable condition, and provided the alteration has been made in the manner provided by the Act, such alteration is valid and binding on the company (11).

It sometimes happens that the managing director, secretary or managing agents of a company with a view to perpetuate their office get a clause inserted in the memorandum of association fixing their tenure of office and remuneration. Such a clause was held by the Madras High Court to be one embodying a very important condition within this section (12). But it was subsequently held by the Bombay High Court that such provisions were nothing more than a detail of management for the purpose of carrying on the business of the company and could not be considered to be a vital condition (13).

**195. Alteration of memo.:** A company may alter its memorandum of association in the following respects :—

- (i) by changing its name (ss. 21 to 24) ;
- (ii) by altering it in regard to the State in which the registered office is to be situated or its objects (s. 17) ;
- (iii) by altering its share capital by (s. 91) :
  - (a) increasing its share capital ;
  - (b) consolidating and dividing its capital into shares of larger amounts,
  - (c) converting its paid up shares into stock and reconverting the stock into paid up shares ;
  - (d) sub-dividing its shares into shares of smaller amounts ;
  - (e) cancelling shares ;
- (iv) by re-organizing its share capital (s. 391 to 396) ;
- (v) by reducing its capital (s. 100) ;
- (vi) by making the liability of the directors unlimited (s. 323).

The effect of the present section is that except the provisions required by s. 13 or by any other specific provision contained in the present Act all other conditions mentioned in the memorandum may be altered in the same manner as the articles.

See notes to the next section.

## 17. Special resolution and confirmation by Court required for alteration of memorandum.—(1) A company may, by special resolution, alter the provisions of its memorandum so as to change the place of its registered office from one

(8) *Ashbury v. Watson* [1885] 30 Ch. D. 376 ; but see *Winstone's case* [1879] 12 Ch. D. 239, 251, & *Guinness v. Land Corporation* [1883] 22 Ch. D. 349, 376.

(9) *Welsbach I. G. Light Co.* [1904] 1 Ch. 87 ; *Underwood v. London Music Hall* [1901] 2 Ch. 309.

(10) *Lord Claud Hamilton's case* [1873] 8 Ch. App 548. In this case the articles provided for the "future qualification" of directors and it was held that "future qualification" meant that of future directors and did not apply to the directors mentioned in the memorandum of association.

(11) *Arya Insurance Co.* [1937] C. 81.

(12) *Venkataramana v. Coimbatore Mercantile Bank* [1924] M. 126, [1923] M.W.N. 568, 18 M.L.W. 304.

(13) *Ramkumar v. Sholapur Spinning & Weaving Co.* [1934] B. 427, 36 Bom. L.R. 907.

State to another, or with respect to the objects of the company so far as may be required to enable it—

(a) to carry on its business more economically or more efficiently ;

(b) to attain its main purpose by new or improved means ;

(c) to enlarge or change the local area of its operations ;

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ;

(e) to restrict or abandon any of the objects specified in the memorandum ;

(f) to sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings, of the company ; or

(g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until, and except in so far as, it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of the debentures of the company, and to every other person or class of persons whose interests will, in the opinion of the Court, be affected by the alteration ; and

(b) that, with respect to every creditor who, in the opinion of the Court, is entitled to object to the alteration, and who signifies his objection in the manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court :

Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by clause (a).

(4) Notice of the alteration shall also be given to the Registrar and he shall be given a reasonable opportunity to appear before the Court and state his objections and suggestions, if any, with respect to the confirmation of the alteration.

(5) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions, if any, as it thinks fit, and may make such order as to costs as it thinks proper.

(6) The Court shall, in exercising its powers under this section, have regard to the rights and interests of the members of the company and of every class of them, as well as to the rights and interests of the creditors of the company and of every class of them.

(7) The Court may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it thinks fit for facilitating, or carrying into effect, any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase.

This section combines ss. 12, 13 and 14 of the old Act. Compare s. 5 of the English Act of 1948—*Notes on Clauses*.

The Joint Committee has made some alterations in the section and has inserted sub-s. (4) with the following observation:—"The Committee consider it necessary to empower the Registrar to appear before the Court in case he desires to point out any irregularity in an alteration to its memorandum proposed by the company. Sub-clause (4) makes the necessary enabling provision in this behalf" [*Vide J.C.R.*, para (15)].

By the Lok Sabha the present heading of this section has been substituted for "Procedure for alteration of memorandum in certain respects".

**196. Scope:**—Sub-s. (1) of s. 16 only authorizes alterations which are within the limits provided by the memorandum of association (14). "To my mind", says Lord Esher M. R., "it is a plain enactment that the company cannot alter anything in the memorandum which is a condition save what is expressly mentioned in that section. . . Now anything which is laid down as a rule in the memorandum of association must, I think, be taken to be one of the conditions on which the company is established" (15). S. 16 does not, however, limit alteration of the memorandum to an alteration of the objects clause, inasmuch as the whole of the objects of a company is not necessarily contained in that clause (16). The petition will be granted where the proposed alteration is designed for the better attainment of the objects of the company (16). Where the memorandum conferred certain preferential rights upon a particular class of shares, the rights became unalterably attached and could not be modified unless under the provisions for modification provided for by any of the sections of the Act (17).

**196A. Special resolution:**—A company may by special resolution alter the provisions of its memorandum with respect to its objects, but the alteration cannot take effect until it is confirmed by the Court on petition. The foundation of the

(14) *Ashbury Ry. Carriage &c. Co. v. Riche* [1875] L.R. 7 H.L. 653.

(15) *Ashbury v. Watson* [1885] 30 Ch. D. 376, 380-81.

(16) *Incorporated Glasgow Dental Hospital v. Lord Advocate* [1927] S.C. 400.

(17) *E. D. Sassoon United Mills* [1929] B. 38, 30 Bom. L.R. 598.

jurisdiction to confirm the alteration is the passing of the special resolution. There must be strict evidence that meeting has been duly convened and that the special resolution has been duly passed (18). As to what is a valid special resolution under this section see the case noted below (19).

**197. "Province"—Jurisdiction** :—Reading the definition of the word "province" in the General Causes Act, 1897 with ss. 46 (1) and 94 of the Government of India Act, 1935, as amended after partition of India, the aforesaid word in sub-s. (1) of s. 12 of the old Act was limited to provinces which fell within India. Consequently the District Judge, Nagpur had no jurisdiction to confirm the resolution, passed after partition of India by a company having its registered place of business in Nagpur to transfer the same to Karachi in the province of Sind in Pakistan (20).

**198. Unlawful object** :—The Court cannot allow alteration of the objects of a company so as to include in them an unlawful object. Where a prize chit, in which those who get the benefit of the drawings get a prize and the benefit which they get from the drawings gives them different advantages from the persons whose names or numbers are not drawn, amounts to a lottery; the Court will not sanction alteration of a memorandum of association so as to include within its objects the conduct of such prize chits (21).

**198A.** :—In the matter of confirmation of a resolution under this section, the Court is bound to exercise a discretion having regard to the interests of the various persons, shareholders, creditors and others (22). The Court should regard as convenient and advantageous those things which experience and the opinion of traders reasonably show to be of that character (23). In the last cited case alteration was sanctioned extending the objects in such a way as to combine with its existing business other business of an independent, though not unconnected, character, but upon the terms that the name of the company should be altered so as to indicate the extensive change in the character of the business.

**199. Court's power of alteration** :—The Court may however in its discretion sanction very wide (24) alteration of the objects of a company including the alteration of a power to purchase other undertakings, to lease the whole of the company's business, to amalgamate with other concerns and to sell the whole or part of its business (25), for such consideration as the company thinks fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar. But the Court will not make provision to meet the possibility of the company desiring at some future time to carry on yet another class of business (26). The Act does not enable a company in general terms to alter its memorandum of association, neither does it confer a general power upon the Court to do so; but the alterations to be sanctioned are confined to those specified in the section (27). On a petition

(18) *Regent Estate Ltd.* [1955] N.U.C. 5914 (Cal.) relying on [1895] 2 Ch. 127 and [1931] 47 T.L.R. 899.

(19) *Blackburn P. Assee. Co.* [1914] 2 Ch. 430.

(20) *Safe Bank Ltd. v. Provincial Government* [1949] N. 290, [1949] Nag. 237, [1949] N.L.J. 237.

(21) *Udumalhat Nidhi Ltd.* [1934] M. 482, 67 M.L.J. 415, 152 I.C. 440.

(22) *Mercantile Bank v. Coimbatore Mercantile Bank* [1925] M.W.N. 568, 18 M.L.W. 304, 74 I.C. 966.

(23) *National Boiler Insurance Co.* [1892] 1 Ch. 306.

(24) *New Westminister Brewery Co.* [1911] W.N. 247, 105 I.T. 946; *Anglo-American Telegraph Co.* [1911] W.N. 248, 105 I.T. 947.

(25) *Marshall, Sons & Co.* [1919] W.N. 207, 63 S.J. 683.

(26) *John Brown Ltd.* [1914] W.N. 434, 112 I.T. 232.

(27) *Govt. Stock Investment Co.* [1891] 1 Ch. 649.

under this section, the Court will have to be satisfied that the new objects are definitely expressed in definite language and fall within sub-s. (1) (28).

On a petition for confirmation, the Court will not hear a person having an interest outside the company that may be injuriously affected by the alteration (29). In dealing with a petition for such confirmation the Court will assume, in the absence of evidence to the contrary, that the company will carry on its business properly, and will not therefore have regard to the fact that the alteration in its objects will enable the company to carry on a business competing with that of a body with a very similar name (29).

The Court rarely refuses to confirm a resolution for alteration of the objects (30). It is now well established that the Court has jurisdiction to sanction any alteration of the company's objects, even though consisting of the adoption of an entirely new object clause in modern form in substitution for an old restricted one, upon its being satisfied that this is required to place the company on an equality as regards the efficient carrying on its business with more recently formed companies (31).

If the alterations are such as render the company's name misleading, the Court may require the name to be changed so as to express the alteration in its aims or sphere of action (32), unless such an alteration of the name will be very inconvenient (33).

**200. Sub-s. (1) :** An alteration under sub-s. (1), cl. (a) must be one which will leave the business substantially what was before with only such changes in the mode of conducting it as will enable it to be carried on more economically or more efficiently (34). Under this clause a power to borrow and give security, a power to invest reserves in various securities and other ancillary powers may be authorized (35). As an instance of alteration under cl. (a) see the undenoted case (36) where the Court held that the alteration enabled the company to carry on its business more efficiently and that the investment in the class of securities specified in the petition was a business which might conveniently or advantageously be combined with the business of the company. In this case, of the debenture holders eight-ninths assented and one-ninth dissented, and the alteration was sanctioned on certain conditions.

In cl. (b), it should be noted, the expression is "to attain its main purpose" and not "to attain its objects."

An instance of cl. (c) will be found in the case noted below (37).

**200A. :** The additional business under cl. (d) may be a business wholly different from, and bearing no relation to, the existing business of the company and yet be capable of being conveniently and advantageously combined with it, provided that the new business is not destructive of or inconsistent with the existing business (38). Whether the proposed new business is one of this description is a question for the determination of the directors and shareholders (38); for the Court will not look

(28) *D. & D. H. Fraser Ltd.* [1903] W.N. 73.

(29) *Hearts of Oak & Co.* [1920] 1 Ch. 544.

(30) *Indian M. G. Extracting Co.* [1891] 3 Ch. 531; *Govt. Stock Investment Co.* (infra); *Alliance Marine Assurance Co.* [1892] 1 Ch. 300; and cases in note (32), infra.

(31) *New Westminster Brewery Co.* (supra); *John Brown Ltd.* (supra); *Marshall, Son & Co.* (supra); for other cases see *Palmer's Company Law*, 13th ed., p. 75.

(32) *Indian Mechanical G. Extracting Co.* (infra); *Govt. Stock Investment Co.* [1892] 1 Ch. 597; *Alliance Marine Assurance Co.* [1892] 1 Ch. 300; *Foreign & Colonial Govt. Trust Co.* [1891] 2 Ch. 395; *Oriental Telephone Co.* [1891] W.N. 153.

(33) *Trust & Agency Co. of Australasia* [1908] W.N. 229, 25 T.L.R. 61.

(34) *Cyclists' Touring Co.* [1907] 1 Ch. 269; *Boslom Bros.* (1928) Ltd. [1935] Ch. 413.

(35) *Buckley*, 11th ed., p. 14.

(36) *Govt Stock Investment Co.* [1892] 1 Ch. 597.

(37) *Indian Mechanical G. Extracting Co.* [1891] 3 Ch. 528.

(38) *Parent Tyre Co.* [1923] 2 Ch. 222.

to the wisdom or desirability of the proposed alteration. All that it has to decide is whether the alteration is fair and equitable as between the members of the company (39). In the last cited case the Court refused to sanction an alteration involving abandonment of the objects of a fundamental character.

Where the company had ceased to trade for the time being and therefore there was no business being carried on with which the proposed new business could be combined, it was held that the Court could not under cl. (d) confirm the alteration (40.)

As an illustration of cl. (e) see the case noted below (39).

**201. Alteration :—**The alteration must be for one of the objects specified in the section which does not authorize alterations for mere amplification of the description of objects clearly comprised in the original memorandum (41), or the acquisition of a large number of general powers, many of which the company does not intend to exercise (42). But an alteration is "with respect to the objects of the company" within the meaning of sub-s. (1), where it is desirable for the purpose of more efficiently carrying out the main object of the company (43).

The alteration of a company's objects may be confirmed wholly or in part (44). The company may also make the alteration to restrict or abandon any of its objects (45).

**202. Distinction between object and condition :—**Where by a clause in in the memorandum a person was appointed agent, secretary or managing director, the appointment could not be regarded as one of the objects of the company, but it was held to amount to a condition within the meaning of s. 10 of the previous Act which could not be altered either by the company or by the Court (46). The decision of Schwabe C. J. in the last cited case has however been dissented from in a later case of the Bombay High Court by Beaumont C. J. and Rangnekar J. (47); see notes to s. 16.

In the last cited case a clause in the memorandum of association provided that "the firm of Morarji Gokuldas & Co. or whatever member or members that firm may for the time being consist of shall be the agents of the company, so long as the said firm shall carry on business in Bombay or until they resign . . .," it was held that the original members of the firm having died and none of the present members of the firm having been partners with either of those individuals, namely Morarji and Gokuldas, the present members of the firm did not come under the clause. "The argument of the appellant really seeks", observed Beaumont C. J. at p. 429. "to endow this firm with the attributes of a corporation having perpetual succession so far as concerns its relations with the company."

**203. Procedure :—**At the hearing of a petition for confirmation, the original memorandum and articles of association as well as the minute book must be made exhibits to the affidavit (48). As to the sufficiency of advertisement of the special resolution, see *Atlantic Patent Fuel Co.* [1917] W.N. 214, 253. Although there has

(39) *Jewish Colonial Trust* [1908] 2 Ch. 287.

(40) *Re Drages Ltd.* [1942] 1 A.E.R. 194.

(41) *Consett Iron Co.* [1901] 1 Ch. 236.

(42) *D. & D. H. Fraser, Ltd.* (supra).

(43) *Scientific Poultry Breeders' Assn.* [1933] 1 Ch. 227 (C.A.) reversing the decision of Eve J. reported in [1932] 2 Ch. 212; *Incorporated Dental Hospital v. Lord Advocate* [1927] S.C. 400.

(44) *Spiers & Pond* [1895] W.N. 135, 2 Mans. 596.

(45) *Jewish Colonial Trust* (supra).

(46) *Mercantile Bank v. Coimbatore Mercantile Bank* [1923] M.W.N. 568, 74 I.C. 966, 18 M.L.W. 304.

(47) *Ramkumar v. Sholapur Spinning & Weaving Co.* [1934] B. 427, 36 Bom. I.R. 907.

(48) *Omnium Investment Co.* [1895] 2 Ch. 127.

been no advertisement of the petition, advertisements would, in the circumstances of the case, be dispensed with (49).

Under the practice of the Calcutta High Court with regard to petitions under this section, a summons for directions is not taken out when the creditors are not entitled to object. The Judge, however, must be satisfied that there are no creditors entitled to object (50). If there are creditors who are entitled to object to the proposed alteration, a summons for directions as to the proceedings for settlement of the list of creditors should be taken out immediately on the presentation of the petition. Procedure similar to that laid down in rr. 19 to 30 of the Appendix J. may be followed. After the settlement of the list of creditors, further directions for the hearing of the petition may be obtained (50). Besides, before making the order, the Court should fix a date for the hearing of the petition and direct advertisement to be published of the presentation of it and of the date of hearing (50).

**204. Unlimited and guarantee companies :—**The High Court has jurisdiction to sanction an alteration of the memorandum of association of an unlimited company which has no capital (51), or a guarantee company having no share capital (52); but if an unlimited company seeks to limit its liability, alters its memorandum and adopts the word "limited" in its name, it must register itself as a limited company before applying for sanction to the alteration (53).

**205. Advertisement of order :—**Unless a valid special resolution has been passed, the Court cannot confirm the proposed alteration of objects (54). The Court will, except in special cases, require advertisement of order made under this section (55).

For the mode of alteration of the form of constitution of a company which was in existence before the commencement of Act VI of 1882, see s. 579.

**Sub-s. (3)** applies to persons such as creditors or members of the company (56).

**206. What the Court will consider :—**All that the Court has to decide is whether the alteration is fair and equitable as between members of the company. It is not concerned with the wisdom or desirability of the proposed alteration, which is a question for the directors and members. The Court will refuse to sanction the alteration if the wishes of the majority of shareholders cannot be ascertained (57). In the matter of alteration the Court is, however, bound to exercise a discretion having regard to the interests of the various persons, shareholders, creditors and others (58).

The Court will not, as a general rule, allow a company to take large additional powers which it has not any reasonable intention of using in the near future, except under very special circumstances (59). The Court may also sanction the alteration with the addition of a clause to the effect that none of the additional objects should be undertaken except as subsidiary objects, unless with the sanction by a special

(49) *Empire Trust, Ltd.* [1891] 64 L.T. 221.

(50) *Regent Estate Ltd.* [1955] N.U.C. 5914 (Cal.) relying on [1907] 1 Ir. Rep. 237.

(51) *North of England &c. Assn.* [1900] 1 Ch. 481.

(52) *Monmouthshire &c. Society* [1909] W.N. 6.

(53) *Royal Exchange Buildings, Glasgow* [1911] S.C. 1337 (Ct. of Sess.).

(54) *Blackburn P. Assurance Co.* [1914] 2 Ch. 430.

(55) *Lancaster Banking Co.* [1897] W.N. 3, 75 L.T. 647; *Copper Mines Tinplate Co.* [1897] W.N. 20.

(56) *Hearts of Oak &c. Co.* (supra).

(57) *Jewish Colonial Trust* [1908] 2 Ch. 287.

(58) *Mercantile Bank v. Coimbatore Mercantile Bank* (supra).

(59) *D. & D. H. Fraser Ltd.* [1903] W.N. 73.



resolution (60). In the under-noted case (61) the Court sanctioned resolutions extending the objects defined in the memorandum adding words so as to limit the extended objects.

Where the evidence showed that the business of the company could be more conveniently carried on with less restricted borrowing powers, and that the proposal to give to the company the additional powers of a guarantee and finance company would enable the company to carry on business more efficiently and attain its purpose by improved means and also conveniently and advantageously combine other business with its original business, it was *held* that the Court ought to sanction the proposed alterations (62).

### 18. Alteration to be registered within three months.—

(1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the Registrar, and he shall register the same, and shall certify the registration under his hand.

(2) The certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum as so altered shall be the memorandum of the company.

(3) Where the alteration involves a transfer of the registered office from one State to another, a certified copy of the order confirming the alteration shall be filed by the company with the Registrar of each of the States, and the Registrar of each such State shall register the same, and shall certify under his hand the registration thereof; and the Registrar of the State from which such office is transferred shall send to the Registrar of the other State all documents relating to the company registered, recorded or filed in his office.

(4) The Court may, at any time, by order, extend the time for the filing of documents under this section by such period as it thinks proper.

This section corresponds to s. 15 of the previous Act. Sub-s. (1) of that section has been split up into two sub-sections—*Notes on Clauses*.

The Joint Committee has made some verbal alterations in this section.

The heading of this section has been substituted by the Lok Sabha for "Procedure on confirmation of the alteration."

### 19. Effect of failure to register.—(1) No such alteration as is referred to in section 17 shall have any effect until it has been duly registered in accordance with the provisions of section 18.

(60) *Re John Brown Ltd.* [1914] W.N. 434, 112 L.T. 132.

(61) *Fleetwood Estate Co.* [1897] W.N. 20.

(62) *Empire Trust, Ltd.* [1891] 64 L.T. 221.

(2) If the registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court under sub-section (4) of section 18, such alteration and order and all proceedings connected therewith shall, at the expiry of such period of three months or of such further time, as the case may be, become void :

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

This section corresponds to s. 16 of the previous Act, the first para of which has been split up into two sub-sections—*Notes on Clauses*.

Some verbal alterations have been made in this section by the Joint Committee.

### *Provisions with respect to names of companies*

**20. Companies not to be registered with undesirable names**—(1) No company shall be registered by a name which, in the opinion of the Central Government, is undesirable.

(2) Without prejudice to the generality of the foregoing power, a name which is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, may be deemed to be undesirable by the Central Government within the meaning of sub-section (1).

207. As the name of the company has to be mentioned in its memorandum, cls. 17 to 21 (now ss. 20 to 24) have been placed immediately after the provisions relating to the memorandum. Sub-s 1 of s. 20 is based on s. 17 of the English Act of 1948. It generalises the specific prohibitions contained in s 11 (3) of the old Act. Sub-s. (2) is based on the latter portion of s. 11 (1) of the old Act—*Notes on Clauses*.

See notes to s. 22.

The Lok Sabhas has substituted the heading of this section for "Prohibition of regulation of companies by undesirable names."

**21. Change of name by company.**—A company may, by special resolution and with the approval of the Central Government signified in writing, change its name.

This section is based on s. 11 (4) of the previous Act and s. 18 (2) of the English Act of 1948—*Notes on Clauses*.

See notes to s. 22.

**207A.** :—A change in the name of a company during the pendency of a suit does not affect the rights of the company. If, therefore, the decree is passed in its old name it can be executed by the company in its new name (63).

The question whether the company did or did not obtain the approval of the Central Government to change its name is a question of fact and cannot be raised for the first time in second appeal (63). See N. 215A *post*.

**22. Rectification of name of company.**—(1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which, in the opinion of the Central Government, is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, whether under this Act or any previous companies law, the first-mentioned company—

(a) may, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name; and

(b) shall, if the Central Government so directs within twelve months of its first registration or registration by its new name, as the case may be, or within twelve months of the commencement of this Act, whichever is later, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow.

(2) If a company makes default in complying with any direction given under clause (b) of sub-section (1), the company, and every officer who is in default, shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.

Compare s. 11 (2) of the previous Act and s. 18 (1) of the English Act of 1948—  
*Notes on Clauses.*

In this section the words "within twelve months of the commencement of this Act; whichever is later" have been inserted after "as the case may be", by the Joint Committee with the following observation :—"There are some cases now, especially in Part B States, in which two or more companies have the same name. Government have therefore been given power to direct an alteration of the names of such companies, within twelve months from the coming into operation of this Bill" (*vide* J.C.R., para 16).

For definition of Central Government see Note 123 under s. 10 *ante*.

In the second line of sub-s. (2) for the word "it" the words "the company, and every officer who is in default" have been substituted by the Lok Sabha.

**208. The Emblems and Names (Prevention of Improper use) Act XXII of 1950** :—This Act prohibits, the use of, or registration of a company or firm which bears (1) the name, emblem or official seal of the United Nations Organizations; (2) the name, emblem or official seal of the World Health Organization; (3) the Indian National Flag; and (4) the official seal or emblem of the Government of India or of any State or any other insignia or coat of arms used by any such Government or by a department of any such Government without the previous

permission of the Central Government or of such officer of Government as may be authorised on this behalf by the Central Government. *See this Act printed in Appendix.*

**209. Company's name :—**The word "company" or any similar word need not form part of a company's name. Such names as "Bose Brothers, Ltd.," "Rakha Mines Ltd.," "M. T., Ltd.," "Canning Employees' Fund Ltd.," may be used.

Under the company law, both English and Indian, a company by registering its name gains a monopoly of the use of that name. Even if the company is not registered, the Court will restrain the registration under the Act a projected new company which was intended to carry on the same business as the unregistered company and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public (64).

A new company is not permitted to be registered in a name so nearly resembling the name of an existing company as to be calculated to deceive (65), or to lead to confusion (66). The Registrar may refuse to register the company, and the Court generally does not interfere with his discretion, unless it is exercised on a wrong principle (67) of law or the Registrar was influenced by extraneous considerations (67).

A company may not get registered in a name as will lead to the belief that it is carrying on the business of an existing firm (68), even if it be a foreign company (69). The sound as well as spelling of the name will be considered (70), and absence of fraud is immaterial (71). If however the business is different and the name is not identical, there cannot be any objection on the ground that one of the names is identical (72).

**210. Injunction :—**The Court will grant an injunction where similarity of names may lead to confusion and to interfere with the business of an existing firm or company (73). An inadvertent omission of the company to publish its corporate name will not disentitle it to have the use of its name protected by injunction (74).

In the case noted below (75) the defendant was restrained by injunction from using the initials "B. M. A." on the ground that people who might see the defendant's shops might come to the conclusion that the British Medical Association was in some way connected with those shops.

(64) *Multani v. Paramount Talkies of India* [1942] Bom. 241, 44 Bom. L.R. 505 relying on *Hendriks v. Montague*, *infra*.

(65) *Hendriks v. Montague* [1881] 17 Ch. D. 638 (C.A.); *Madame Tussaud & Sons v. Tussaud* (*infra*); *North Cheshire Brewery Co. v. Manchester Brewery Co.* [1899] A.C. 83.

(66) *Ewing v. Buttercup Margarine Co.* [1917] 2 Ch. 1; *Kingston, Miller & Co. v. Thomas Kingston & Co.* [1912] 1 Ch. 575; *Merchant Banking Co. v. Merchant's Joint Stock Bank* [1878] 9 Ch. D. 560.

(67) *King v. Registrar of Companies* [1912] 3 K.B. 23.

(68) *Madame Tussaud & Sons v. Tussaud* [1890] 44 Ch. D. 678; *Fine Cotton &c. Assn. v. Harwood, Cash & Co* [1907] 2 Ch. 184.

(69) *Société Anonyme &c. & Levassor v. Panhard Levassor &c. Co.* [1901] 2 Ch. 513.

(70) *Ouvah Ceylon Estates Ltd. v. Uva Ceylon Rubber Estates Ltd.* [1901] 108 L.T. 416.

(71) *Pinet & Cie v. Maison Louis Pinet Ltd.* [1898] 1 Ch. 179; *Montreal Litho. Co. v. Sabiston* [1899] A.C. 610.

(72) *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.* [1907] A.C. 430.

(73) *Ouvah Ceylon Estates Ltd. v. Uva Ceylon Rubber Estates Ltd.* (*supra*); *Huntley & Palmer v. Reading Biscuit Co.* [1892] 9 T.L.R. 462; *Thomas Montgomery v. Thompson* [1891] A.C. 217; *Harrods, Ltd. v. R. Harrod* [1924] 40 T.L.R. 195; *J. J. Cash Ltd. v. Cash* [1900] 82 L.T. 655.

(74) *H. E. Randall Ltd. v. British & American Shoe Co.* [1902] 2 Ch. 354.

(75) *British Medical Association v. Marsh* [1931] 47 T.L.R. 572; see also *British Legion v. British Legion Club Ltd.* [1931] 47 T.L.R. 571.

**211. Principle on which the Court interferes :—**The principle on which the Court interferes is that one person is not entitled to represent the business of another as carried on by him (76). A company cannot however appropriate a descriptive word or title so as to obtain a monopoly thereof (77). A person, who has *bona fide*, and without any intention to deceive, adopted a name for business purposes and acquired it by reputation over a considerable period, is entitled to trade under that name and cannot be restrained from so doing, even though the similarity of the name to that of another firm engaged in business in the same trade may occasionally lead to confusion (78). The Court would not grant an injunction where there was no evidence that the defendants imitated the trade marks or labels of the plaintiffs or otherwise attempted to deceive the public, although there was a probability that the public would be occasionally misled by the similarity of the names of the plaintiffs (79).

**212. Registrar's power :—**The Registrar has no power to refuse registration of a company upon the ground that the name of the company would be calculated to deceive people into the belief that the business was carried on by persons not registered as a company under the Act (80).

**213. Distinction :—**A distinction must always be drawn between cases in which the words are of common ordinary meaning and cases in which the words complained of are words which more or less partake of the character of fancy words or do not primarily relate to the article, but to the person who makes it. The onus of proving that words which are commonly and properly used as descriptive words have a secondary or subsidiary meaning so as to entitle the person, who has used them, to their exclusive use, lies on that person and is not easily discharged (81). The name or statement of fact may in its primary sense be strictly true, but may be otherwise in its secondary sense (82).

**214. Right to use name :—**Where the first producer of an article of manufacture has identified it with a particular name or a name which is a word descriptive of the article itself, such a name becomes a trade mark, and cannot be adopted or employed by another person in advertising a similar article. Such adoption and employment will be restrained by injunction (83). Although in the absence of fraud or false personation a man is entitled to carry on business in his own name in competition with a similar business previously well established under the same name notwithstanding that confusion or mistake may arise in consequence, yet if he has never carried on such business, he cannot, by promoting and registering a company with a title of which his name forms a part, confer upon the company the rights which he possesses in the use of that name (84).

**215. Name indicates objects :—**The name of a company indicates, to some extent, its objects (85). When a company ceases to carry on its principal business as indicated by its name, it is liable to be wound up on that ground (85).

(76) *Du Boulay v. Du Boulay* [1869] 1 L.R. 2 P.C. 430.

(77) *Aerators Ltd. v. Tollit* [1902] 2 Ch. 319; *Electromobile Co. v. British Electromobile Co.* [1908] 98 L.T. 258, 24 T.L.R. 192.

(78) *Jay's Ltd. v. Jacobi* [1933] 1 Ch. 411.

(79) *Turton v. Turton* [1889] 42 Ch. D. 128.

(80) *King v. Registrar of Companies, ex p., Bowen* [1914] 3 K.B. 1161.

(81) *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co* [1907] 2 Ch. 312; *Cellular Clothing Co. v. Maxton & Murray* [1899] A.C. 326.

(82) *Reddaway v. Banham* [1896] A.C. 199.

(83) *"Singer" Machine Manufacturers v. Wilson* [1877] 3 App. Cas. 376.

(84) *Fine Cotton & C. Assn. v. Harwood, Cash & Co.* (*supra*).

(85) *Re Crown Bank* [1890] 44 Ch. D. 634; see also *Cotman v. Brougham* [1918] A.C. 514.

If the special resolution is not duly passed, the registration of the new name will be vacated (86).

The change of name is not complete until it has been made in the register and a new certificate of incorporation issued (87).

### 23. Registration of change of name and effect thereof.

—(1) Where a company changes its name in pursuance of section 21 or 22, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein; and the change of name shall be complete and effective only on the issue of such a certificate.

(2) The Registrar shall also make the necessary alteration in the memorandum of association of the company.

(3) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name.

Compare s. 18 (3) & (4) of the English Act of 1948 and sub-ss. (5) and (6) of s. 11 of the old Act. It has been made clear that when the name is changed, the Registrar should himself make the necessary alteration in the memorandum of the company.

—Notes on Clauses.

See notes to s. 22.

**215A. Sub-s (3). Legal proceedings:—**The second portion of this sub-section is a permissive one and is intended to provide for the continuance of the proceedings initiated in its former name. Notwithstanding the alteration in the name the company continues its legal status as before, and the mere change in the name would not affect its constitution (88). See N. 207A *ante*.

**24. Change of name of existing private limited companies.—**(1) In the case of a company which was a private limited company immediately before the commencement of this Act, the Registrar shall enter the word 'Private' before the word 'Limited' in the name of the company upon the register and shall also make the necessary alterations in the certificate of incorporation issued to the company and in its memorandum of association.

(2) Sub-section (3) of section 23 shall apply to a change of name under sub-section (1), as it applies to a change of name under section 21.

(86) *Australasian Mining Co.* [1893] W.N. 74.

(87) *Shackleford, Ford & Co. v. Dangerfield* [1868] L.R. 3 C.P. 407.

(88) *Srinivasiah v. Vellore Varalakshmi Bank* [1954] M. 802.

This new section has been introduced by the Lok Sabha making it obligatory on the Registrar, in the case of existing private companies, to enter the word "Private" before the word Limited in the name of the company upon the register and make the consequential alterations in the certificate of incorporation and the memorandum of association.

**25. Power to dispense with "Limited" in name of charitable or other company.—**(1) Where it is proved to the satisfaction of the Central Government that an association—

(a) is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and

(b) intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members,

the Central Government may, by licence, direct that the association may be registered as a company with limited liability, without the addition to its name of the word "Limited" or the words "Private Limited".

(2) The association may thereupon be registered accordingly; and on registration shall enjoy all the privileges, and (subject to the provisions of this section) be subject to all the obligations, of limited companies.

(3) Where it is proved to the satisfaction of the Central Government—

(a) that the objects of a company registered under this Act as a limited company are restricted to those specified in clause (a) of sub-section (1), and

(b) that by its constitution the company is required to apply its profits, if any, or other income in promoting its objects and is prohibited from paying any dividend to its members,

the Central Government may, by licence, authorise the company by a special resolution to change its name, including or consisting of the omission of the word "Limited" or the words "Private Limited"; and section 23 shall apply to a change of name under this sub-section as it applies to a change of name under section 21.

(4) A firm may be a member of any association or company licensed under this section, but on the dissolution of the firm, its membership of the association or company shall cease.

(5) A licence may be granted by the Central Government under this section on such conditions and subject to such regulations as it thinks fit, and those conditions and regulations shall be binding on the body to which the licence is granted, and where the grant is under sub-section (1), shall, if the Central Government so directs, be inserted in the memorandum, or in the articles, or partly in the one and partly in the other.

(6) The body to which a licence is so granted shall be exempt from the provisions of this Act relating to—

(a) the use of the word "Limited" or the words "Private Limited" as any part of its name,

(b) the publishing of its name,

(c) if the Central Government so directs and to the extent specified in the direction, the obligation laid on the company to send lists of its members to the Registrar, and

(d) if the Central Government so directs and to the extent specified in the direction, the obligations laid on the company by section 303.

(7) The licence may at any time be revoked by the Central Government, and upon revocation, the Registrar shall enter the word "Limited" or the words "Private Limited" at the end of the name upon the register of the body to which it was granted; and the body shall cease to enjoy the exemption granted by this section:

Provided that, before a licence is so revoked, the Central Government shall give notice in writing of its intention to the body, and shall afford it an opportunity of being heard in opposition to the revocation.

(8) Where a body in respect of which a licence under this section is in force alters the provisions of its memorandum with respect to its objects, the Central Government may—

(a) revoke the licence if it sees fit to do so, or

(b) vary the licence by making it subject to such conditions and regulations as the Central Government thinks fit, in lieu of, or in addition to, the conditions and regulations, if any, to which the licence was formerly subject.

(9) Upon the revocation of a licence granted under this section to a body the name of which contains the words



"Chamber of Commerce", that body shall, within a period of three months from the date of revocation or such longer period as the Central Government may think fit to allow, change its name to a name which does not contain those words ; and—

(a) the notice to be given under the proviso to sub-section (7) to that body shall include a statement of the effect of the foregoing provisions of this sub-section ; and

(b) section 23 shall apply to a change of name under this sub-section as it applies to a change of name under section 21.

(10) If the body makes default in complying with the requirements of sub-section (9), it shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

This section corresponds to s. 26 of the previous Act. Sub-s. (4) is based on the C.L.C.'s recommendation in para 38 of their Report. Sub-s. 6 (d) is intended to give effect to the recommendation contained in para 37 of the C.L.C.R. The provision has been drafted in elastic terms. In most other respects the section is based on s. 19 of the English Act of 1948 with a few verbal changes here and there—  
*Notes on Clauses.*

The expression "or the words 'private Limited'" has been inserted in several places of this section by the Joint Committee in accordance with the provision made by them in cl. (a) of sub-s. (1) of s. 13 *ante*.

The Joint Committee has also altered cl. (c) of sub-s. (6) with the following observation—"It was pointed out that if the companies referred to in this clause were exempted from the requirement of submitting lists of their members to the Registrar, no one could find out who were, in fact, members of that company and that this might lead to undesirable and harmful results. The power to grant this exemption has therefore been vested in the Government so that they might use their discretion in restricting the exemption to deserving cases" (*Vide J.C.R., para 17*).

Sub-cl. (11) of the original clause has been deleted by the Joint Committee as unnecessary in view of the Constitution (*vide ibid.*)

**Central Government:**—For definition see Note 123 under s. 10 *ante*.

**216. Licenses:**—In England licence for formation of such companies is granted by the Board of Trade. The provision and the form usually adopted by the Board of Trade prohibiting payments to members do not prohibit any payment made for value received, for service rendered by a member, or the granting of a pension to a retiring officer who is a member (89).

**217. Effect of registration :**—A secretary to an association registered under this section can subscribe and verify the plaint on behalf of the association (90). Where the general objects of a Friendly Society are legal, the fact that some of the rules are illegal does not constitute the Society an illegal association or prevent a member from recovering a sum of money payable to him under a rule which is not illegal (91).

(89) *Cyliat's Touring Club v. Hopkinson* [1910] 1 Ch. 170.

(90) *Northern India Traders Assn. v. Laurie* 43 P.R. 1885.

(91) *Swaine v. Wilson* [1889] 24 Q.B.D. 252.

**218. "Science":**—The word "science" is not confined to pure speculative science alone but includes various branches of science, such as mechanical or engineering science (92).

**219. "Charity":**—"Charity" includes giving relief to the poor (92a). But the word "charity" is liberally construed and is not confined to such charity as consists of giving relief to the poor (93).

**220. Club:**—It is only a member's club, as distinguished from a proprietary club, which is eligible for registration under this section. Registration under this section is *prima facie* proof that the club is not an association for profit (94).

**221. Alteration of Memo.:**—In case an association formed under this section desires to alter its memorandum of association, it should submit the proposed alterations to the Government first and if the Government approve them, then apply to the Court under s. 17 (65). Where however the High Court has by order granted an application for confirmation of alteration without its being first approved by the Government, the High Court has jurisdiction to cancel its wrong order (96).

**222. Income tax:**—It has been recently held by the Allahabad High Court that a chamber of commerce incorporated under this section as an association limited by guarantee, not existing for earning profits and prohibited under the law from declaring any dividends to its members, is not exempted from being assessed to income tax, and that the chamber could not claim exemption *quod* any money it might have elected to spend on charity (97).

**223. Societies Registration Act, 1860:**—Societies for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, the diffusion of political education, or for charitable purposes are also registered under the Societies Registration Act 1860. See the Act and the form of the memorandum of association &c. printed in the Appendix.

### Articles of Association

**26. Articles prescribing regulations.**—There may in the case of a public company limited by shares, and there shall in the case of an unlimited company or a company limited by guarantee or a private company limited by shares, be registered with the memorandum, articles of association signed by the subscribers of the memorandum, prescribing regulations for the company.

This section corresponds to sub-s. (1) of s. 17 of the previous Act. The Words "or a private company limited by shares" after the words "company limited by guarantee" have been inserted by the Joint Committee.

(92) *Commissioners of Inland Revenue v. Forest* [1890] 15 App. Cas. 334.

(92a) *Re Young's Will Trusts* [1955] 3 A.E.R. 689.

(93) *Commissioners of Income Tax v. Pemsel* [1891] A.C. 531.

(94) *Cosmopolitan Club v. Dy. Commercial Tax Officer* [1952] M. 814.

(95) *St. Hilda's Incorporated College* [1901] 1 Ch. 556; *Ugar Sen v. Chamber of Commerce, Hapur* [1937] All. 202, [1936] A.L.J. 1129.

(96) *Ugar Sen v. Chamber of Commerce, Hapur* (supra).

(97) *Chambers of Commerce, Hapur v. Commissioner of Income Tax* [1936] A 764. [1936] A.L.J. 1085. But see *New York Life Insurance Co. v. Styles* [1890] 14 App. Cas. 381; *United Service Club v. Crown* [1921] 2 Lah. 208, 61 I.C. 886; *Commissioner of Income Tax v. Millowners M. I. Assn.* [1932] B. 104, 56 Bom. 119, 135 I.C. 813, 33 Bom. I.R. 1581; *Secretary, Board of Revenue v. Myslapore H. P. Fund* [1923] 47 Mad. 1, 76 I.C. 833.

**224. Constructive notice of Act and articles :—**A person dealing with a company must be taken to have read the Act as well as the articles of association and will be deemed to have had constructive notice of their contents (98). So, where the articles required that all deeds &c. should be signed by the managing director, the secretary and the working director on behalf of the company, but the services of the managing director not being available as prosecution against him by the company was pending, a deed of mortgage was executed by the secretary and the working director only. It was held that the mortgage could not be enforced as the illegality appeared on the face of the bond, although the loan under the mortgage was applied for the purposes of the company (99).

**225. Articles are subordinate to memo. :—**The articles are subordinate to the memorandum of association. Any clause in the former at variance with the latter is to that extent inoperative (1). The articles cannot modify the memorandum of association in any of the particulars required by the Act to be stated in the memorandum (2), which is the area beyond which the company cannot go; but inside that area the shareholders may make such regulations for their own government as they think fit (3). If a thing is forbidden by the memorandum, it cannot be done; if not, it is immaterial that the change quite alters the composition of the company (4). Lord Selborne said in *Dent's case* (5): "It is quite certain that if there be found anything in the articles limiting liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void." For further cases see notes to s. 36.

**226. Their respective functions :—**The memorandum of a company sets out the objects for which the company is established and the company cannot travel beyond the limits specified therein. The articles of association regulate the internal management of the company and define the powers of directors, but cannot enlarge the scope of the objects specified in the memorandum. If the articles go beyond the memorandum, they are to that extent *ultra vires* (6). Primarily the memorandum alone can be looked at for the purpose of ascertaining the objects of a company. It is only in case of ambiguity that the articles may be referred to for the very limited purpose of explaining the ambiguity (6).

The articles cannot also extend the objects defined in the memorandum of association. Lord Justice Bowen thus distinguished the respective functions of the memorandum and the articles of association: "The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and the outside public, as well as the shareholders. The articles are the internal regulations of the company" (7). They are however to be read together; the articles may then explain or amplify the memorandum (8).

(98) *Kotla Venkataswamy v. Chinta Ramamurthy* [1934] M. 579, 67 M.L.J. 327, 151 I.C. 932; *Charnock Collieries Co. v. Bholanath* [1912] 39 Cal. 810, 16 I.C. 976.

(99) *Kotla Venkataswamy v. Chinta Ramamurthy* (supra); see also *John Shaw & Sons (Salford) Ltd. v. Shaw* [1935] 2 K.B. 113 (C.A.).

(1) *Ashbury v. Watson* [1885] 30 Ch. D. 376 (C.A.); *Baglan Hall Colliery Co.* [1870] 5 Ch. App. 346, where Lord Justice Giffard said that if there were contradictions between the articles and the memorandum, the former must give way.

(2) *Guinness v. Land Corporation of Ireland* (infra).

(3) *Ashbury Ry. Co. v. Riche* [1875] L.R. 7 H.L. 653.

(4) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361.

(5) [1873] 8 Ch. App. 768.

(6) *Shyam Chand v. Calcutta Stock Exchange Ltd.* [1949] C. 337, [1945] 2 Cal. 313.

(7) *Guinness v. Land Corporation of Ireland* [1882] 22 Ch. D. 949.

(8) *London Financial Association v. Kelk* [1882] 26 Ch. D. 107.

**227. Articles—how far a contract :—**The articles establish a contract between the members and the company (9), and although there is no contract in terms between each individual member and every other (10), the articles regulate their rights *inter se* (11). But this contract is not for the benefit of strangers or even of members in some other capacity, for the articles are not contracts with outsiders (12). A statement in the articles that a particular person shall be the secretary, manager or other officer of the company will not amount to a contract with him (12); but where on the footing of the articles the directors are employed by the company and accept office, the terms of the articles impliedly form a contract between the company and the directors (13). A provision in the articles in favour of a promoter that the preliminary expenses shall be paid by the company, gives to the promoter no right of action against the company (14). Articles cannot be considered as a contract between the company and a third person, e.g., a *vendor* (15). Where a company by its articles appointed a firm as its managing agents who acted as such pursuant to an agreement the terms of which were scheduled to the articles, but the agreement was not executed, and the company claimed back the moneys drawn out by the firm as their remuneration as well as the preliminary expenses, it was held that the company was not entitled to recover the money, although the firm could not sue for and recover it by any course of law (16).

Not only a third party, but even a shareholder cannot sue the company on anything contained in the articles treating them as a contract with the company. Where the secretary was removed from the post and brought a suit for declaration, that he was still the secretary, on the ground that the board of directors had no power to remove him under the articles, it was *held* that the plaintiff's appointment as secretary must be regarded as *de hors* the articles, and it was incumbent on him to make out a contract outside and independently of the articles. He had no cause of action on the basis of the articles (17).

The fact that a loan company registered under Act X of 1866 had published and caused to be registered rules regarding the payment of interest on loans, did not bind a borrower, unless he had contracted to do so (18).

As to the powers required to be taken in the articles see para 49 of the Introduction.

**228. Duties of persons dealing with a company** :—Where a company is regulated by an Act of the legislature or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act or the registered documents and to see that the proposed dealing is not

- (9) *Borland's Trustee v. Steel Brothers & Co.* [1901] 1 Ch. 279; *exp. Beckwith* [1898] 1 Ch. 324.
- (10) *Salmon v. Quin & Axtens* [1909] 1 Ch. 311; *Oakbank Oil Co. v. Crum* [1883] 8 App. Cas. 65.
- (11) *Per Lord Herschell in Welton v. Saffery* [1897] A.C. 299, 314; see also *Wood v. Odessa Water Works Co.* [1889] 42 Ch. D. 636 at p. 642.
- (12) *Eley v. Positive &c. Assurance Co.* [1876] 1 Ex. D. 20, 23 I.T. 743; *Browne v. La Trinidad* [1888] 37 Ch. D. 1; *Hickman v. Kent Sheep Brothers' Assn.* [1915] 1 Ch. 881; see also *Boston Deep Sea Fishing Co. v. Ansell* [1888] 39 Ch. D. 339.
- (13) *Swabey v. Port Darwin Gold Mining Co.* [1889] 1 Meg. 385; *exp. Beckwith* [1898] 1 Ch. 324; see *Dale & Plant Ltd.* [1889] 43 Ch. D. 255, 62 I.T. 206; *Issac's case* [1892] 2 Ch. 158; *Salisbury-Jones's case* [1894] 3 Ch. 356.
- (14) *Rotherham Alum & Chemical Co.* [1883] 25 Ch. D. 103.
- (15) *Pritchard's case* [1873] 8 Ch. App. 956 at p. 960; *Issac's case* [1892] 2 Ch. 158.
- (16) *Sree Minakshi Mills v. Callianjee* [1935] M. 799, 68 M.L.J. 510, 156 I.C. 570 distinguishing *Bodega Co.* [1904] 1 Ch. 276.
- (17) *Mothey Krishna v. Anjaneyulu* [1954] M. 113.
- (18) *Tipperah Loan Offices, Ltd. v. Gour Chandra* [1878] 2 C.L.R. 349.

inconsistent with them (19); but they are not bound to do more (19). They need not inquire into the regularity of the proceedings—what Lord Hatherley called the “indoor management” (19). Thus where the articles give power to borrow with the sanction of a general meeting, a lender need not inquire whether such sanction has in fact been obtained (19). If there is a managing director and there is authority in the articles for the directors to delegate their powers to him, a person dealing with him *bona fide* may assume that he has power to do what he purports to do, provided that it is within the company's objects (20); so too in the case of a mortgagee taking a mortgage from a company executed by such a person (21).

On the same principle a person dealing with a company is entitled to assume that the *de facto* directors are directors *de jure*, whether they are properly appointed or not (22). But a person who has notice of the irregularity cannot claim the benefit (23), nor does the rule apply where the requisite signatures are forged (24).

A person dealing with a company may also assume that the articles registered have been duly adopted by the company (25). The Company as well as the person dealing with it can equally rely upon the articles (22).

A person dealing with a company must take the articles to be such as appear at the office of the Registrar of Companies to be in force. If the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution; for such a resolution, if passed, would be registered (26).

In this connection the observation of Lord Haldane in *Pacific Coast Coal Mines. v. Arbutnot* (27) are most instructive: “No doubt where some act, such as the granting of an obligation in the course of its business, is put by the constitution of the company within its power and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality, such as proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity. He is presumed to know the constitution of the company, but not what may or may not have taken place within doors that are closed to him. Lord Hatherley's judgment in *Mahony v. East Holyford Mining Co.* [(1875) 7 H.L. 896] is for practitioners in company law the classical exposition of this principle. But the case stands quite other wise, when the act is one which has not by the constitution of the corporation been put within its power excepting on the fulfilment of a condition. In that event, the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled.”

See notes to s. 10—heading “Third persons.”

**229. Scope of articles:**—Where the articles provide for the borrowing powers to be exercised in a particular manner, then in the absence of an express authority

- (19) *Royal British Bank v. Turquand* [1856] 6 E. & B. 327; *Mahony v. East Holyford Mining Co.* [1875] L.R. 1 H.L. 869; *Duck v. Tower Galvanising Co.* [1901] 2 K.B. 314; *Charnock Collieries v. Bholanath* [1912] 39 Cal. 810; *Khulna Loan Co. v. Jahir Goidar* [1914] 24 I.C. 209.
- (20) *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93.
- (21) *County of Gloucester Bank v. Rndry Merthyr Colliery Co.* [1895] 1 Ch. 629, 633.
- (22) *Mahony v. East Holford Mining Co.* [1875] 7 H.L. 869; *County Life Assurance Co.* [1870] 5 Ch. App. 288; *Bank of Syria* [1900] 2 Ch. 272, on appeal [1901] 1 Ch. 115.
- (23) *Howard v. Patent Ivory Manufacturing Co.* [1888] 38 Ch. D. 156.
- (24) *Ruben v. Great Fingall Consolidated* [1906] A.C. 439.
- (25) *Muirhead v. Forth & North Sea &c. Assn.* [1894] A.C. 72 at p. 78.
- (26) *National Coal Co. v. Gyan Ranjan* (infra).
- (27) [1917] A.C. 607 (P.C.) at p. 616.

delegating such powers to the directors, the latter cannot exercise those powers (28). The articles cannot authorize the company to do anything which is expressly or impliedly forbidden by the Act, e.g., to pay dividends out of capital (29), nor can they take away from the company or its members any rights conferred by the Act (30). A clause in the articles of association exempting directors from liability except for fraud will protect them from a claim for negligence (31). But see s. 201.

Where the resolutions of a company and its directors are inconsistent with the provisions of the articles, the company may be restrained from acting upon them (32).

A clause in the articles cannot be used to defeat the rules of Court as to discovery and inspection of documents (33).

**230. Stamp:**—As to the stamp on articles of association see Appendix—"Stamp Duty." The stamp must be affixed before or at the time of signature (34).

**27. Regulations required in case of unlimited company, company limited by guarantee or private company limited by shares.**—(1) In the case of an unlimited company, the articles shall state the number of members with which the company is to be registered and, if the company has a share capital, the amount of share capital with which the company is to be registered.

(2) In the case of a company limited by guarantee, the articles shall state the number of members with which the company is to be registered.

(3) In the case of a private company having a share capital, the articles shall contain provisions relating to the matters specified in sub-clauses (a), (b) and (c) of clause (iii) of sub-section (1) of section 3; and in the case of any other private company, the articles shall contain provisions relating to the matters specified in the said sub-clauses (b) and (c).

This section corresponds to sub-ss. (3) and (4) of s. 17 of the previous Act, and sub-ss. (1) and (2) of the English Act of 1948.

The new sub-s. (3) has been added by the Joint Committee.

**28. Adoption and application of Table A in the case of companies limited by shares.**—(1) The articles of association of a company limited by shares may adopt all or any of the regulations contained in Table A in Schedule I.

(28) *National Coal Co. v. Gyan Ranjan* [1927] 45 C.L.J. 96.

(29) *Mac Dougall v. Jersey Imperial Hotel Co.* [1864] 2 H. & M. 528.

(30) *Peveril Gold Mines* [1898] 1 Ch. 122.

(31) *Brazilian Rubber Estates* [1911] 1 Ch. 425.

(32) *Salmon v. Quin & Axtens, Ltd.* [1909] 1 Ch. 311; see also *Automatic Self-cleansing Filter Syndicate v. Cunningham* [1906] 2 Ch. 34.

(33) *Curtland v. Houston & Co. Navigation Co.* [1912] W.N. 110.

(34) S. 17, Stamp Act, 1899.

(2) In the case of any such company which is registered after the commencement of this Act, if articles are not registered, or if articles are registered, in so far as the articles do not exclude or modify the regulations contained in Table A aforesaid, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Sub-s. (1) gives effect to the C.I.C.'s recommendation in para 34. All the regulations set out in s. 17 (2) of the previous Act (in addition to some others which according to the C.I.C., should also be obligatory on all companies) have been embodied in the Act. The latter portion of the first paragraph of s. 17 (2) and the two provisos have accordingly been omitted. Sub-s. (2) corresponds to s. 18 of the former Act—*Notes on Clauses*.

The words "in the case of companies limited by shares" and some consequential changes have been inserted by the Joint Committee.

This section corresponds to s. 8 of the English Act of 1948.

**231. Table A a part of the Act :—** Table A is a part of the Act. So, if a company adopts it or some analogous provisions as its regulations, they will not be invalid even if they are apparently at variance with the sections of the Act (35). They may be looked at showing the views of the legislature with regard to matters mentioned in them (36). Where Table A is adopted power should be taken to fix the minimum subscription and to pay underwriting commission, as these powers are not to be found in the new or the old Table A. Where Table A or some of its provisions are sought to be excluded, it should be done in clear language (37).

**232. Application of Table A :—** Where the articles of a company are neither registered along with the memorandum of association, nor subsequently passed in a manner provided by the law, they cannot take effect as articles of association so as to replace the general provisions of Table A (38). But if by a long course of conduct the shareholders have put forward such articles as embodying regulations by which they were prepared to be bound, they are binding on the company (39). The Court may also act upon a distribution of assets, not in strict accordance with the articles, if there has been a general adoption of the method of distribution (40).

**233. Adoption of articles :—**When an article is one which the company has power to adopt, the fact that there has been a defect in the procedure of its adoption will not prevent a person dealing with the company on the faith of the article from insisting that it shall be treated as binding on the company, and the company can equally insist upon such articles where they have been made the basis of a contract with a stranger (41).

(35) *Lock v. Queensland &c. Co.* [1896] A.C. 461. See also *New Balkis Eersteling v. Rand Gold Mining Co.* [1904] A.C. 165.

(36) *Re Pyle Works* [1899] 41 Ch. D. 534, 571; *Barned's Banking Co.* [1867] 3 Ch. App. 105, 113-14.

(37) *Fisher v. Black & White Publishing Co.* [1901] 1 Ch. 174 (C.A.).

(38) *Prayan Prasad v. Gaya Bank & Trades Assn.* [1931] P. 44, 10 Pat. 249, 190 I.C. 634.

(39) *Ho Tung v. Man On Insurance Co.* [1902] A.C. 232 (P.C.); *Kunj Kishore v. Buldeo Mills* [1914] 96 All. 416.

(40) *Beeston Pneumatic Tyre Co.* [1898] W.N. 34, 14 T.L.R. 338; *North-West Argentine Ry. Co.* [1900] 2 Ch. 882.

(41) *Muirhead v. Forth & North Sea Assn.* [1894] A.C. 72 at p. 78.

**234. Where Table A does not apply :—**The regulations of Table A would not apply to a company registered under Part VIII of the previous Act, unless such regulations were adopted by a "special resolution" (42), nor to a company registered before 1st April, 1914. Companies existing at the commencement of the Act which have adopted as their articles either the regulations contained in Table B in the Schedule of Act XIX of 1857 or those contained in Table A of the First Schedule of Act VI of 1882 and Act VII of 1913 will still be governed by those regulations (43).

**29. Form of articles in the case of other companies.—**The articles of association of any company, not being a company limited by shares, shall be in such one of the Forms in Tables C, D and E in Schedule I as may be applicable, or in a Form as near thereto as circumstances admit.

This section has been inserted by the Joint Committee with the following observation :—"The appropriate place for the provision contained in this clause is here and not in the original clause 595. See paragraph 14 dealing with clause 14" (*Vide* J.C.R., para 18).

It corresponds to s. 151 (1) of the previous Act and s. 11 of the English Act of 1948.

**30. Form and Signature of articles.—**Articles shall—

- (a) be printed ;
- (b) be divided into paragraphs numbered consecutively ; and
- (c) be signed by each subscriber of the memorandum of association (who shall add his address, description and occupation, if any,) in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

This section corresponds to s. 19 of the previous Act and s. 9 of the English Act of 1948. Reference has been added to the occupation of the subscribers of the memorandum in accordance with the C.L.C.R.—*Notes on Clauses*.

The words at the end of cl. (c) after the word "signature" have been added by the Lok Sabha.

The directors have no power to remit or accept surrender of shares of those who signed the articles (44).

As to who is competent to attest the signature see notes to s. 15.

Every member is entitled to get, on payment of one rupee, a copy of the memorandum and articles of association (45).

For the stamp duty to be paid on the articles of association see Art. 10 of the Stamp Act as amended by the local Acts. (See Appendix—"Stamp Duty.")

(42) s. 578.

(43) S. 657.

(44) London &c. Consolidated Coal Co. [1877] 5 Ch. D. 525.

(45) S. 39.



**31. Alteration of articles by special resolution.—**(1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may, by special resolution, alter its articles.

(2) Any alteration so made shall, subject to the provisions of this Act, be as valid as if originally contained in the articles and be subject in like manner to alteration by special resolution.

(3) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

This section corresponds to s. 20 of the previous Act. Except that sub-s. (1) of that section has been split up into two sub-sections no change has been made—*Notes on Clauses.*

It corresponds to s. 10 of the English Act of 1948.

**236. Power of altering articles is statutory :—**A company cannot deprive itself of the statutory power to alter its articles of association (46), either by a statement in the articles (47) or by a contract (48) that they shall not be altered (49). A thing which is in the articles, but not in the memorandum, may be altered (46). Any new article may be adopted which could have been lawfully included in the original articles (50), provided that the alteration was made *bona fide* for the benefit of the company as a whole (51). "The power," said Lindley, M.R., "thus conferred on corporations to alter the regulations is limited only by the provisions in the company's memorandum of association. It must be exercised for the benefit of the company as a whole and it must not be exceeded. These conditions are always implied and are seldom, if ever, expressed. But if they are complied with, I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it (52)". In this case the Court of Appeal held that the introduction of a clause by altering the articles was valid though in some sense it operated retrospectively.

- (46) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361 (C.A.); *Chithambaram v. Krishna* [1910] 33 Mad. 36.
- (47) *Walker v. London Tramways Co.* [1879] 12 Ch. D. 705; *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656.
- (48) *Punt v. Symons & Co.* [1903] 2 Ch. 506; *Allen v. Gold Reefs* (supra).
- (49) *Malleon v. National Insurance Corporation* [1894] 1 Ch. 200; *All India Railway Men's Benefit Fund v. Baheshwarnath* [1945] N. 187, [1945] Nag. 599, [1945] N.L.J. 249.
- (50) *Sidebottom v. Kershaw, Leese & Co.* [1920] 1 Ch. 154; see also *Allen v. Gold Reefs* (supra) and *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch. 290.
- (51) *British Equitable Assurance Co. v. Bailey* [1906] A.C. 35, 42; *Sidebottom v. Kershaw, Leese & Co.* (supra).
- (52) *Allen v. Gold Reefs of West Africa* (supra).

A shareholder has no right to assume that the company's articles will always remain in a particular form; and he cannot object to alteration of the articles, provided the special resolution has been passed *bona fide* and did not unfairly discriminate (53).

An association was incorporated and registered under this Act. The contract as originally entered into by the association with the member was not for payment of a definite sum, but for a sum which had to be ascertained on the basis of the number of the claims arising when the member's claim matured. On the coming into force of the Insurance Act, 1938, the association altered its articles. The members had notice of the meetings and they said nothing against the regularity of the resolution passed: *Held* that the alteration was binding upon the shareholders (54).

Where the articles provide for matters which need not, under the previous sections, be contained in the memorandum and which are not either expressly or impliedly dealt with therein, the portions of the articles so dealing with such matters cannot be treated as part of the memorandum, and can be altered by a special resolution (55).

**237. Court's jurisdiction** :—Amendments to the articles of association do not require the confirmation of the Court (56). The Court has no jurisdiction to rectify the articles of association, even if they do not accord with what is proved to have been the concurrent intention of the signatories at the moment of the signatures (57).

**238. Amendment by special resolution** :—If a special resolution is not passed, the articles will not be validly altered (58). A company can pass a special resolution altering the articles conditionally upon the happening of some other event, e.g., confirmation by the Court of reduction of capital previously resolved upon (59). If the directors issue notice to the effect that alterations will be made in respect of certain articles, while there are equally important alterations in respect of other articles, it cannot be said that the shareholders have sufficient notice of alteration in respect of the latter. The notice should give sufficiently full and frank disclosures of the facts and effects of the resolutions (60). Any alterations in the articles of association cannot bind the members from whom notice of the meeting, at which the alteration was made, was withheld. For, the articles form a contract between a member and the company, and one party to a contract cannot add terms to the contract without the knowledge and consent of the other party (61). Where a company amends its articles by special resolution without mentioning in the notice under s. 189 that the question of amendment of the articles was to come for decision in the meeting, the irregularity is fatal to the proceedings and makes the amendment invalid and *ultra vires* (62). The passing of a special resolution inconsistent with an existing article would not be effective unless the special resolution had been passed in previous meetings altering that article (63).

As to "special resolution," see s. 189 *post* and notes thereto.

(53) *Greenhalgh v. Alderne Cinemas Ltd.* [1950] 2 A.E.R. 1120 (C.A.).

(54) *All India Railwaymen's Benefit Fund v. Babeshwarnath*, *supra*.

(55) *Chithambaram v. Krishna* [1910] 33 Mad. 36.

(56) *Radiant Chemical Co.* [1943] Pat. 278, 22 Pat. 204.

(57) *Scott v. Frank F. Scott (London), Ltd.* [1940] Ch. 791, (C.A.) approving *Evans v. Chapman* [1903] 86 L.T. 381.

(58) *Malleson v. National Insurance Corpn.* [1894] 1 Ch. 200; *Railway Sleepers Supply Co.* [1885] 29 Ch. D. 204.

(59) *Australian Estates Co.* [1910] 1 Ch. 414, 435.

(60) *Narayanlal v. Maneckji Petit Manfg. Co.* [1931] B. 354, 33 Bom L.R. 556.

(61) *Madhava v. Canara Banking Corporation* [1940] 2 M.L.J. 973 [1941] M.W.N. 28.

(62) *Gulab Singh v. Punjab Zemindara Bank* [1940] 1 L. 243.

(63) *Imperial H. Hotel Co.* [1883] 25 Ch. D. 1, (C.A.).

**239. Limitation of alteration :—**The articles must be altered in good faith and not so as to give an unfair advantage to a majority of the shareholders (64), that is, not so as to oppress or defraud a minority of shareholders or to violate any statutory provision or principle of law; but the power, like other powers, must be exercised fairly and according to law (65). This is the only limitation in the power to alter the articles of association (66).

A company has power under this section to introduce, by altering the articles, a provision that shareholders, who carry on business in competition with the company, may be required to transfer their shares to a nominee of the directors at price certified by the auditors to be their fair value, provided that the alteration is for the benefit of the company as a whole (67); if otherwise, the new provision is invalid (68).

The section cannot be used to oppress or defraud a minority of the shareholders or so as to violate any statutory provision or principle of law (69). A majority will not be permitted by the Court to commit fraud on the minority (70). No majority can, even by altering the articles retrospectively, affect to the prejudice of non-consenting shareholders their rights under a previous contract (71).

**240. Right to issue preference shares :—**In the case of the issue of preference shares and the like, there is generally outside the articles a contract conferring special rights. If the original articles do not contain the power to issue preference shares the company may take the power by special resolution (72).

**241. Alteration in the case of existing company :—**A company existing before the commencement of the present Act may adopt the Table A of this Act as its regulations by passing a special resolution to the following effect: "The existing regulations of the company are hereby rescinded and in lieu thereof the regulations contained in Table A of the Companies Act shall be the regulations for the management of the company subject to the modifications hereinafter set forth."

**242. Alteration in breach of contract :—**A company will not be allowed to alter its articles in breach of contract with an outsider (73); but it is otherwise if the outsider has taken his contract subject to the risk (74). As regards contracts between a company and its members respecting their shares, it should not be assumed that the contract involves, as one of its terms, an article which is not to be altered (75). A shareholder must be taken to know that one of the incidents of membership is that the company may, by adopting the proper method *bona fide*, alter its articles in a way which may prejudicially affect his interest; and provided that the alteration in the articles is not inconsistent with the objects set out in the memorandum of association and is *bona fide* made in the interest (76) of the company, the shareholders will be bound by such alteration. But a special contract may be made with the

(64) *Menier v. Hooper's Telegraph Works* [1874] 9 Ch. App. 350; *Punt v. Symons* (supra); *Marshall's Valve Gear Co. v. Manning, Wardle & Co.* [1909] 1 Ch. 267; *Neal v. City of Birmingham Tramways* [1910] 2 Ch. 464.

(65) *All India Railwaymen's Benefit Fund v. Basheshwarnath*, supra.

(66) *Consolidated S. R. M. Deep* [1909] 1 Ch. 491; *British American Nickel Corp'n. v. O'Brien* [1927] A.C. 369 at p. 371.

(67) *Sidebottom v. Kershaw, Leese & Co.* (supra).

(68) *Dafen Tinplate Co. v. Llanelly Steel Co.* [1920] 2 Ch. 124.

(69) *Peveril Gold Mines* [1898] 1 Ch. 122; *Payne v. Cork Co.* [1900] 1 Ch. 308.

(70) *Normandy v. Ind. Coope & Co.* [1908] 1 Ch. 84.

(71) *Per Rigby L. J.* in *James v. Buena Ventura Syndicate* [1896] 1 Ch. 456 at p. 466; but see *Allen v. Gold Reefs of W. Africa* (infra).

(72) *Andrews v. Gas Meter Co.* (supra); see *Stewart Precision Carburettor Co.* [1912] W.N. 100, 28 L.T.R. 335.

(73) *British Murac Syndicate v. Alpertion Rubber Co.* [1915] 2 Ch. 186.

(74) *British Equitable Assurance Co. v. Bailey* [1906] A.C. 35.

(75) *Per Lord Lindley, M. R.* in *Allen v. Gold Reefs of W. Africa* [1900] 1 Ch. 656, 673.

(76) *Shuttleworth v. Cox Bros. & Co.* [1927] 2 K.B. 9 (C.A.).

company in the terms of or embodying one or more of the articles. In that case, if an alteration of the articles so embodied is inconsistent with the real bargain between the parties, the contractee, even though a shareholder, will not be bound : for a company cannot break its contracts by altering its articles of association (77). But a company may alter its articles so as to vary a contract with an outsider, if the latter has made the contract subject to the risk of the articles being altered (78). A company cannot be precluded from altering its articles of association thereby giving itself power to act upon the provisions of the altered articles, but so to act may nevertheless be actionable if it is contrary to a stipulation in a contract validly made before the alteration (79) "The right to alter the articles being inherent, if it is desired by contract to give an employee or a third person a right of action if there should be an alteration of the articles which causes damages to him, I think it is very desirable to express such a term in clear language" (80).

**243. Other alterations** :—Where the articles, as altered, provided that the shares of any member who became bankrupt should be sold to a certain person at a certain price, and a member became bankrupt and his trustee claimed that he was not bound by the altered articles, it was held that the articles, as altered in the proper way, were a contract between the other members and the bankrupt, and his trustee was bound (81).

By sub-s. (1) a company may, subject to the provisions of the Act and to the conditions contained in the memorandum, alter or add to the articles. By the general law this power must be exercised *bona fide* for the benefit of the company. But it is for the shareholders and not for the Court to say whether an alteration of the articles is for the benefit of the company, provided that it is not of such a character as that no reasonable man can so regard it (82).

**244. Adoption of articles by long acquiescence** :—Although a special resolution is the statutory mode of enacting articles of association, the adoption of certain articles by a company may be proved by long course of acquiescence, as pointed out by Lord Davey (83) : "It appears that these articles have been registered (without signature) and have been published and put forward as the company's articles and have been acted on, amended or added to by the shareholders and the company's business has been conducted under the regulations contained therein for 19 years without any objection and the company on the record says that these articles are its articles. Their Lordships think that in these circumstances they are entitled to draw the inference that all the shareholders have accepted and adopted the articles as the valid and operative articles of the company. The articles stand on a very different footing from the memorandum and are in the power of the shareholders themselves." But see *Pacific Coast Mines v. Arbutnot* (84).

**245. How alteration affects contracts** :—Rights, which have their origin in a contract outside the articles, the terms of which contract are found or referred to in such articles, can be altered by such alteration of the articles, unless it is proved that one of the terms of such contract was that such rights should not be affected by

(77) *Hari Chandana v. Hindustan C. I. Society* [1925] 52 Cal. 289 following *Allen v. Gold Reefs* (supra) ; *Bailey v. British Equitable Assurance Co.* [1904] 1 Ch. 374 and *British Murac Syndicate v. Alperton Rubber Co.* (supra).

(78) *British Equitable Life Assurance Co. v. Bailey* [1906] A.C. 35.

(79) *Southern Foundries (1926) Ltd. v. Shirlaw* [1940] A.C. 701, per Lord Porter.

(80) *Ibid.*, per Lord Maugham (dissentient) at p. 713.

(81) *Borland's Trustee v. Steel Brothers* [1901] 1 Ch. 279.

(82) *Shuttleworth v. Cox Bros. & Co.* [1927] 2 K.B. 9 (C.A.). Dictum of Peterson J. in *Dafen Tinplate Co. v. Llanelly Steel Co.* [1920] 2 Ch. 124, 140 disapproved.

(83) *Ho Tung v. Man On Insurance* [1920] A.C. 232 (P.C.).

(84) [1917] A.C. 607 (P.C.).

an alteration of the articles (85). The articles can be altered retrospectively unless such alteration will cause a breach of contract entered into by the company (86).

**246. New articles Stamp** :—The Act does not contemplate new articles of association, and where it purports to be so, it is nothing more than a special resolution and as such does not require to be stamped (87).

The moving or passing of a resolution regulating the business of the members upon the happening of a sudden and unexpected emergency, e.g., due to unusual rainfall, does not amount to an amendment of the articles (88).

**247. Clerical errors and mistakes** :—Clerical errors in the articles should be set right by a special resolution and not by an action for rectification (89). The Court has no jurisdiction to rectify the articles on the ground of mistake, for they have a statutory operation (89).

### *Change of registration of companies*

**32. Registration of unlimited company as limited, etc.**—(1) Subject to the provisions of this section,—

(a) a company registered as unlimited may register under this Act as a limited company ; and

(b) a company already registered as a limited company may re-register under this Act.

(2) On registration in pursuance of this section, the Registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company ; but, save as aforesaid, the registration shall take place in the same manner and shall have effect, as if it were the first registration of the company under this Act.

(3) The registration of an unlimited company as a limited company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in the manner provided by Part IX of this Act in the case of a company registered in pursuance of that Part.

This section corresponds to s. 67 of the previous Act and s. 16 of the English Act of 1948. The provisions have been generalised so that they may be applicable to all cases which may occur—*Notes on Clauses*.

This section has been slightly recast by the Joint Committee to bring it into conformity with s. 67 of the previous Act (*Vide* J.C.R., para 19).

(85) *Chithambaram v. Krishna* [1910] 33 Mad. 36.

(86) *Allen v. Gold Reefs* (*supra*).

(87) *New Egerton Woollen Mills* [1900] 22 All. 131.

(88) *Pearle Lal v. Dewan Singh* [1930] A. 661.

(89) *Evans v. Chapman* [1902] W.N. 78, 18 T.L.R. 506.

*General provisions with respect to memorandum and articles.*

**33. Registration of memorandum and articles.—(1)**

There shall be presented for registration, to the Registrar of the State in which the registered office of the company is stated by the memorandum to be situate—

(a) the memorandum of the company ;

(b) its articles, if any ; and

(c) the agreement, if any, which the company proposes to enter into with any individual, firm or body corporate to be appointed as its managing agent, or with any firm or body corporate to be appointed as its secretaries and treasurers.

(2) A declaration by an advocate of the Supreme Court or of a High Court, an attorney or a pleader entitled to appear before a High Court, or a chartered accountant practising in India, who is engaged in the formation of a company, or by a person named in the articles as a director, managing agent, secretaries and treasurers, manager or secretary of the company, that all the requirements of this Act and the rules thereunder have been complied with in respect of registration and matters precedent and incidental thereto, shall be filed with the Registrar ; and the Registrar may accept such a declaration as sufficient evidence of such compliance.

(3) If the Registrar is satisfied that all the requirements aforesaid have been complied with by the company and that it is authorised to be registered under this Act, he shall retain and register the memorandum, the articles, if any, and the agreement referred to in clause (c) of sub-section (1), if any.

This section corresponds to s. 22 of the previous Act and s. 12 of the English Act of 1948.

This section has been recast by the Joint Committee with the following observation :—“There was and there is to be, only one Registrar for the whole of a State with a number of Deputy and Assistant Registrars. The words ‘‘or part of the State’’ in the original cl. 28 are therefore unnecessary and have been omitted. Sub-clause (a) of the original clause 30 has been incorporated in this clause which the committee consider to be the more appropriate place for it. As recommended in the Report of the Company Law Committee, the managing agency agreement, if any, which the company proposes to execute is also to be registered with the articles of association (*Vide* J.C.R., para 20).

**248. Date of registration:—**The registration of a company takes place when memorandum and articles are accepted and retained by the Registrar (a), and not on the date on which his signature is written (90). The Registrar will decline registra-

tion if he consider them to be improperly stamped (91). If the certificate of registration be not forthcoming, it may be proved *aliunde* (92).

**249. Registration—effect on limitation** :—There is a conflict of decisions on the question whether the deposit of the memorandum and articles of association with the Registrar of Companies under the direction of the Act 1913 is registration as contemplated by Art. 116 of the Limitation Act (Act IX of 1908). In the case noted below (93) the Madras High Court took the view that registration of memorandum and articles was registration within Art. 116 of the Limitation Act. The same view was taken by Mukerji J. in the Allahabad High Court (94). But in a later Full Bench case (95) the Madras High Court overruled the earlier decision in *Ripon Press & Sugar Mills Co. v. Nama Venkatarama* (93). The Bombay High Court at first took the view of the Madras Full Bench in *Maneklal v. Suryapur Mills Co.* [1928] B. 252, 52 Bom. 477, 30 Bom. L.R. 549. Thereafter Marten C. J. of the High Court observed "I prefer the view expressed by Sir John Wallis in *Ripon Press & Sugar Mills Co. v. Nama Venkatarama* (93) as to the meaning of the word "registered" to any of the judgments which conflict with it" (96). In a recent Full Bench case (97) the Bombay High Court has again laid down that "writing registered" in Art. 116 of the Limitation Act includes a document registered with the Registrar of Joint Stock Companies under the Companies Act.

**250. Function of Registrar** :—The function of the Registrar is quasi-judicial (98) and the Court will not interfere with his decision unless it is clearly satisfied that he has come to a wrong decision (99). If he wrongly refuse registration, mandamus may issue under s. 45 of the Specific Relief Act to compel registration.

For the fees payable for registration see Schedule X.

**34. Effect of registration.**—(1) On the registration of the memorandum of a company, the Registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such

(91) *Queen v. Registrar* [1888] 21 Q.B.D. 131.

(92) *Alliance F. Corpn., Blaney's case* [1866] 3 Bom. H.C.R. O.C. 106.

(93) *Ripon Press & Sugar Mills Co. v. Nama Venkatarama* [1918] 42 Mad. 33, 35 M.L.J. 253, 8 M.L.W. 354.

(94) *Union Bank, Allahabad* [1925] A. 519, 47 All. 669, 23 A.L.J. 473, 88 I.C. 785.

(95) *Vankata v. Sri Tripura Sundari Cotton Press* [1926] M. 615 (F.B.), 49 Mad. 468, 50 M.L.J. 520, 94 I.C. 515. See also *Karachi Bank v. Shewaram* [1933] S. 109, 143 I.C. 713.

(96) *Govind v. Rangnath* [1929] 54 Bom. 226 (252).

(97) *Bal Lalita v. Tata Iron & Steel Co.* [1940] B. 97 (F.B.), [1940] Bom. 165, 42 Bom. L.R. 57, 187 I.C. 389.

(98) *Bowman v. Secular Society* [1917] A.C. 406, 439.

(99) *R. v. Registrar* [1912] 3 K.B. 23.

liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

This section corresponds to s. 23 of the previous Act. No change of substance has been made—*Notes on Clauses*.

It corresponds to s. 13 of the English Act of 1948.

In England a company created a corporation under the Companies Acts is not thereby created a corporation with Common Law rights (1).

**251. Company becomes a legal entity** :- A company, as soon as it is incorporated, becomes a legal entity distinct from its members (2). It becomes a legal *persona* (3) and not a mere aggregate of the shareholders (4). The distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand (5). The incorporator, even if he holds all the shares, is not a corporation and neither he nor any creditor of the company, has any property, legal or equitable, in the assets of the corporation (6); and it follows that two companies so incorporated are not the same persons in the eye of the law even though the shareholders in both the companies are the same persons (7). "It not infrequently happens in the course of legal proceedings," observed Lord Buckmaster, "that parties who find they have a limited company as debtor with all its paid up capital issued in the form of fully paid up shares and no free capital of working suggest that the company is nothing but an *alter ego* for the people by whose action it is controlled. But in truth the Companies Act expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of individuals with the objects that by this means enterprise and adventure may be encouraged. A company therefore which is duly incorporated, cannot be disregarded on the ground that it is a sham although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence" (8). In a recent Privy Council case (5) Lord Russell of Killowen who delivered the judgment observed as follows: "In the Court of Appeal Riddell J. A. would, their Lordships think, have allowed the appeal, but for the fact that he thought from the evidence 'that the company was a sham *simulacrus* or cloak and that its business must be regarded as the business of these three' meaning thereby the three partners. He thought that the true position was that the old company, although a separate legal entity, was acting as the agent of the three partners, and was carrying on as such agent not the business of the old company, but the business of the three partners. . . . But such a view is directly opposed both to the evidence in the case and to the principles and decision in *Saloman v. Salomon* [1897] A.C. 22. In that case Lord Halsbury put his view in the form of a dilemma thus: 'Either the limited company was a entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person or no thing to

(1) *Ashbury Ry. Carriage & Co. v. Riche* [1875] L.R. 7 H.L. 653.

(2) *George Newman & Co.* [1895] 1 Ch. 674 (C.A.); *Saloman v. Salomon & Co.* [1897] A.C. 22, 42, 51; *Commissioners of Inland Revenue v. Sansom* [1921] 2 K.B. 492, 514; *Rainham Chemical Works v. Belvedere & Co.* [1921] 2 A.C. 465, 475, 476, 488; *Janson v. Driefontein Consolidated Mines* [1902] A.C. 497; *Indian Cotton Co. v. Raghunath* [1931] B. 178, 33 Bom. L.R. 111, 130 I.C. 598.

(3) *Per Cave J.* in *Sheffield & Co. Society* [1888] 22 Q.B.D. 470 at p. 476.

(4) *Fliccroft's case* [1882] 21 Ch. D. 519.

(5) *E. B. M. Co. v. Dominion Bank* [1937] P.C. 279, 170 I.C. 545.

(6) *Macaura v. Northern Assurance Co.* [1925] A.C. 619 at p. 633.

(7) *Pattinson v. Bindhya Devi* [1933] P. 196, 12 Pat. 216.

(8) *Rainham Chemical Works v. Belvedere & Co.* [1921] 2 A.C. 465.



be an agent at all ; and it is impossible to say at the same time that there is a company and there is not.' In this case (9) their Lordships have further held that it could not be held for taxation (income tax) purposes that the business was the property of some person and that the company was carrying on the business as agent for that other person and referred to *Commissioners of Inland Revenue v. Sansom* [1921] 2 K.B. 492. In a public statute the word "person" means primarily a person in law and includes "any company or association or body of individuals incorporated or not" (10).

Where some of the partners of a firm carrying on the business of plying buses formed a private limited company and sold to it their own buses and which they could do under the partnership agreement, the other partners had no legal right to sue for accounts of the business done by the limited company which was altogether a third person and has an entity of its own with a perpetual succession (11).

A company is a legal entity, and where a duty is imposed upon a company in such a way as the breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company (12).

**252. Suit by or against a company** :—An incorporated company must sue and be sued in its corporate name (13). "It is an elementary principle," observed Lord Davey (14), "of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so. Again it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well known cases of *Foss v. Harbottle* (15) and *Mozley v. Alston* (16) and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. . . . The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate as was alleged in the case of *Meier v. Hooper's Telegraph Works* (17). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of a majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, J. in *Mac Dougall v. Gardiner*" (18).

Such a company can sue for libel affecting its property or for a libel reflecting on the management of its business or attacking its financial position (19). In such

- (9) *E. B. M. Co. v. Dominion Bank* [1937] P.C. 279, 170 I.C. 545.
- (10) S. 3, cl. (42), General Clauses Act (X of 1897) as amended by A.L.O. 1950 see also *Gramophone & Type-writer v. Stanley* [1908] 2 K.B. 89.
- (11) *Dhulia-Amalner Motor Transport Ltd. v. Raychand* [1952] B. 337.
- (12) *Rangoon E. T. Supply Co. v. Emperor* [1933] R. 70, 11 Rang. 162, 145 I.C. 710.
- (13) *India General S. N. & R. Co. v. Lahuohan* [1916] 43 Cal. 441.
- (14) *Burland v. Earle* [1902] A.C. 83 (P.C.) at pp. 93-94.
- (15) 1843 Ha. 461.
- (16) 1847 Ph. 790.
- (17) 1874 9 Ch. App. 350.
- (18) [1875] 1 Ch. D. 13, 25.
- (19) *Thorley's Cattle Food Co. v. Massam* [1883] 14 Ch. D. 763 (C.A.).

cases it is not necessary to prove special damage (20). A trading company may sue in respect of a malicious and unreasonable presentation of a winding up petition against it (21).

A suit for recovery of salary or wages lies against the company and not its secretary or managing director (22). But a solicitor preparing, on instruction from persons who became directors subsequently, memorandum and articles of association before the formation of the company, cannot sue the company, although it has taken the benefit of his work (23). Even the expenses of registration cannot be recovered (24).

In England a company cannot be sued by the vendor on contract made before the incorporation (25). The persons who made the contract on behalf of the company remain personally liable, even if it is afterwards ratified by the company (26); for a company cannot by adoption or ratification obtain benefit of an agreement purporting to be made on its behalf before its incorporation (25). In order to do so, a new contract must be made with it after its incorporation on the terms of the old one (25). The new contract may however be inferred from the facts of the case (25).

**253. Signing and verification of pleadings** :—The pleadings should be signed and verified on behalf of the company by the secretary or by any director or other principal officer who is able to depose to the facts of the case (27). But it is open to a corporation to authorise any person to institute a suit on its behalf, and any person acquainted with the facts of the case can verify the plaint (28). The Court may at any stage of the suit require the personal appearance of such an officer who may be able to answer material questions relating to the suit (29). In the case noted below (30) Buckland J. has held that in the case of a company or corporation it must be established by an affidavit, (1) that the person signing the pleading was authorised to do so, and (2) that the person verifying it was fit to do so. But when a specific rule has been laid down in O. 29, r. 1, C.P.C. regarding the signing and verification of pleadings in the case of corporations, the specific rule, it is submitted with great respect, excludes, so far as it goes, the general rule provided in Rules 14 and 15 of O. 6, C.P.C. Under Rule 3 of O. 29, C.P.C. the Court may at any stage of the suit require the personal appearance of the secretary, director or other principal officer of the corporation who may be able to answer material questions relating to the suit, thus providing a sufficient safeguard. Of course a company can always authorize some other person under the last para. of O. 6, r. 14 to sign the pleading. If the company does not choose that course it can act under O. 29, r. 1, *i.e.*, it can rely on that Order as in fact constituting the persons named therein as agents to sign without

(20) *Empire T. S. Machine Co. v. Linotype Co.* [1898] 79 L.T. 8 (C.A.).

(21) *Quartz Hill G. M. Co. v. Eyre* [1883] 11 Q.B.D. 674. (C.A.).

(22) *M. Abdul Haq v. Das Mal* [1913] 19 I.C. 595.

(23) *English & Colonial Produce Co.* [1906] 2 Ch. 435; see the judgment of Vaughan Williams L. J. at p. 441. The Company is not liable even in equity—per Buckley, L. J. But in this case the solicitor was allowed to recover the registration fee paid by him on the ground that the company was under a statutory obligation to pay the registration fees, but see *N. 703* under s. 149 *post*. See also *Scott v. Loid Ebury* [1867] L.R. 2 C.P. 255.

(24) *National M. M. Coach Co., Clinton's claim* [1908] 2 Ch. 515.

(25) *Natal Land &c. Co. v. Pauline &c. Syndicate* [1904] A.C. 120. See also the judgment of Erle C. J. in *Kelner v. Baxter* (*infra*) at p. 183.

(26) *Kelner v. Baxter* [1866] L.R. 2 C.P. 174.

(27) C. P. Code, Or. XXIX, r. 1.

(28) *Karnal Distillery Co. v. Jaiswal* [1950] 52 P.L.R. 426.

(29) C. P. Code, Or. XXIX, r. 3.

(30) *International &c. Compagnie v. Mehta & Co.* [1927] C. 780, 31 C.W.N. 1030, 105 I.C. 768.

the necessity of an express authority (31). In a proceeding for or against a company it cannot be represented by the Registrar of Companies (32).

**254. Contract before incorporation :**—In a case coming from a British Dominion it has been held by the Privy Council that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence; and in order to do so a new contract must be made with it after its incorporation on the terms of the old one (33). In the last cited case at p. 126, Lord Davey who delivered the judgment said: "It is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence; it is unnecessary to cite all the cases in which this has been decided from *Kelner v. Baxter* (34) downwards. But the facts may shew that a new contract was made with the company after its incorporation on the terms of the old contract." In India too it has been held that a company cannot be bound by a contract entered into on its behalf before the company was formed, and that it is not competent to bring a company into existence bound to enter into a contract with a third party, the terms of which have been arranged before the company is formed. It is for the company to consider after its formation whether it will enter into the contract or not (35). It has been held by the Privy Council that a company cannot be bound by any contract made on its behalf before it comes into existence, nor can it, subsequent to its formation, ratify such a contract (36). This however need not prevent a contracting party under certain circumstances from becoming a trustee for the company in respect of agreements which such party has made for the company's benefit (36). But s. 23 of the Specific Relief Act expressly provides that the specific performance of a contract may be obtained by— "(h) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company." S. 27 cl. (e) of the same Act provides that when the promoters of a public company have before its incorporation entered into a contract, specific performance thereof may be enforced against the company, "provided that the company has ratified and adopted the contract and the contract is warranted by the terms of its incorporation." These two sections however have been held to be inapplicable to contracts to take shares (37).

In the very recent case of *Barasat Basirhat Light Railway Co. v. District Board of 24 Parganas* (1946 C. 23) Mr. Justice Gentle has further held that if the terms are not expressly set out in the new agreement, entered into by the company after its incorporation but are ascertained by reference in it to the terms contained in the old agreement, the new agreement will be of full effect upon the terms in the earlier agreement; and that an agreement, to which the company was not a party and which was entered into on its behalf by the promoters of the company before its incorporation, cannot be enforced by the company even if after its incorporation it has adopted and ratified the agreement. But it does not appear that the above mentioned provisions, namely, cl. (b) of s. 23 and cl. (e) of s. 27 of the Specific Relief Act, 1877 were

(31) *Calico Printers' Assn. v. Karim* [1930] B. 566, 32 Bom. L.R. 1305, 128 I.C. 557; *Osborne, Garrett & Co. v. Abdulla* [1931] S. 178, 134 I.C. 1170.

(32) *Kawdu v. Berar Ginning Co.* [1929] N. 185, 116 I.C. 427.

(33) *Natal Land & Colonization Co. v. Pauline Colliery & Development Syndicate* [1904] A.C. 120 (P.C.); followed in *Barasat Basirhat Light Ry. Co. v. District Board of 24 Parganas* [1944] C. 23, [1944] 2 Cal. 101.

(34) [1866] L.R. 2 C.P. 174, 15 L.T. 313.

(35) *Ram Kumar v. Sholapur Spinning & Weaving Co.* [1934] B. 427, 36 Bom. L.R. 907.

(36) *Wearne Brothers, Ltd. v. Russa Engineering Works* [1928] 7 Rang. 144 (P.C.).

(37) *Imperial Ice Manufacturing Co. v. Manchershaw* [1889] 13 Bom. 415.

brought to the notice of his Lordship, nor that he considered what effect those provisions have upon the question.

The Court will not make an order the effect of which is to enforce specifically any contract of personal service (38).

**255. Date of registration** :—The date of registration of a company is the date mentioned in the certificate and not that on which the signature of the Registrar was written (39). The effect of this section is that the date mentioned in the certificate is the first day of the company's corporate existence, and it is not open to any one to prove the moment of time on which a corporate act was done that day and then to say that the company was not in existence at that moment. The corporate person is to be treated as having been in existence for the whole of the day on which it was incorporated (39).

**256. Effect of registration** :—As soon as a company is registered, it becomes a distinct legal 'person' even if the members thereof consist of seven persons, only one of whom holds all the shares and the rest are mere *cestui que trust*. "If they are shareholders, they are shareholders for all purposes, and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestui que trust* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities and dealing with them in their relation to the company; the only relation which I believe the law would sanction would be that they were corporators of the corporate body" (40). "Whether they are beneficiaries or bare trustees is a matter with which neither the company nor creditors have anything to do: it concerns only them and the *cestui que trust* if they have any" (41). "It may be that a company constituted like that under consideration was not in the contemplation of the legislature at the time when the Act authorizing limited liability was passed, that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law not to make it and it must be remembered that no one need trust a limited company unless he so please and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held" (41). See notes to s. 3 (1) (i).

As to the effect of registration under this Act upon limitation of actions, specially whether the memorandum and articles of association registered under s. 33 *ante* is in "writing registered" within Art. 116 of the Limitation Act, see notes to s. 33 *ante*.

**257. Co-operative society** :—In the case of a co-operative society registered under the Co-operative Societies Act, 1912 as well as under the Companies Act, it has been held by a Full Bench of the Patna High Court that the effect of incorporating such a company under the Companies Act is to make the society a legal person, and if a man trust such a corporation he trusts that legal person and must look to its assets for payments and he can only call upon individual members to contribute in case the Act or charter so provides (42).

**258. Commencement of business** :—A private company can commence business as soon as it is incorporated. As to the right of a public company in this respect see s. 149.

(38) *Ram Kumar v. Solapur Spinning & Weaving Co.* [1934] B. 427, 36 Bom. L.R. 907.

(39) *Jubilee Cotton Mills* [1923] 1 Ch. 1, on appeal [1924] A.C. 958.

(40) *Salomon v. Salomon & Co.* [1897] A.C. 22 at p. 30, per Lord Halsbury.

(41) *Ibid* at p. 46, per Lord Herschell.

(42) *Harihar v. Bansi* [1931] P. 321 (F.B.), 12 P.L.T. 619, 134 I.C. 421.

**259. Certificate of incorporation :**—If the original certificate of incorporation is lost or if a copy is required for any other reason, another certificate may be obtained from the Registrar (43).

As to the seal, see regulation 84, Table A and notes thereto.

**35. Conclusiveness of certificate of incorporation.—**  
A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under this Act.

This section corresponds to s. 24 of the previous Act and s. 15 of the English Act of 1948.

It was originally cl. 30 of the Bill, sub-s. (2) of which has been transferred by the Joint Committee to s. 32 (*vide* J.C.R., paras 20 and 21).

**260. Application :**—This section applies *proprio vigore* to companies registered under Part IX of the Act, and a certificate of incorporation is conclusive evidence that all the requirements of the Act in respect of registration have been complied with and that the association is a company authorised to be registered and duly registered under the Act (44).

**261. Certificate conclusive :**—The certificate of incorporation is conclusive on the following points, *viz.*, (1) that all the requirements of the Act in respect of registration and of matters precedent and incidental thereto have been complied with (45); (2) that the association is a company authorised to be registered under the Act; (3) that it has been duly registered. Even though a company is formed for the mere purpose of being registered, the question cannot be raised whether it was authorised to be registered under the Act (46). The only function of the Court therefore is to construe the memorandum of association as it stands (47).

A certificate of incorporation is conclusive evidence of the fact that each subscriber of the memorandum wrote opposite to his name the number of shares he took, and he cannot be permitted to prove the contrary (48).

It was held in 1891 that the certificate of incorporation could not be treated as conclusive of the fact that seven persons signed the memorandum of association and that if a less number signed it, the Court had no jurisdiction to make a winding up order (49). But in a later case from India the Privy Council have held that the certificate is conclusive for all purposes, even though the conditions of registration prescribed by the Act were not duly complied with and there were not seven subscribers to the memorandum of association (50). The certificate is conclusive, but it will not make illegal objects legal (51).

(43) S. 610.

(44) *Rama Sundari v. Syamendra Lal* [1947] 2 Cal. 1.

(45) *Jubilee Cotton Mills* (*supra*); *Peel's case* (*infra*); *Nassau Phosphate Co.* [1876] 2 Ch. D. 610; *Oakes v. Turquand* (*infra*).

(46) *Hammond v. Prentice Brothers* [1920] 1 Ch. 201.

(47) *Cotman v. Brougham* [1918] A.C. 514. See also *Peel's case* [1867] L.R. 2 Ch. App. 674 and *Oakes v. Turquand* [1867] L.R. 2 H.L. 325.

(48) *Collector of Moradabad v. Equity Insurance Co.* [1948] O. 197, 23 Luck. 210, [1948] O.W.N. 172.

(49) *National Debenture Assets Corporation* [1891] 2 Ch. 505.

(50) *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* [1912] 16 C.W.N. 937 (P.C.), 40 Cal. 1.

(51) *Bowman v. Secular Society* [1917] A.C. 406 at p. 439.

Although the conduct of the Registrar in knowingly registering the memorandum which had been altered is most censurable, the certificate is conclusive evidence that the company was duly constituted and the requirements of the Act complied with (52).

**36. Effect of memorandum and articles.**—(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

This section corresponds to s. 21 of the previous Act and s. 20 of the English Act of 1948. The language has been generalised so as to make a reference not only to the members of the company but also to the company—*Notes on Clauses*.

**262. Notice :**—The members are deemed to be aware of the memorandum and the articles of association (53) and to understand their meaning (54). But in certain circumstances where they are induced to become members by fraud, this rule does not apply (55).

**263. Outsiders :**—Outsiders dealing with a company must also be taken to have read the Act and the memorandum and articles of association of the company he is dealing with, and thus to have had constructive notice of their contents (56); but they are not bound to make enquiries and may assume that the company's internal management has been regular (57), and that the provisions therein contained have been complied with by the company's officers. Where by the articles the directors were directed forthwith to execute by affixing the seal of the company to the scheduled agreement entered into with a firm, strangers to the company were entitled to assume that, that direction had been carried out and that as a consequence the firm was entitled to act as managing agents with the powers conferred by the scheduled agreement (58).

**264. Memorandum :**—The memorandum of association irrevocably binds a subscriber thereof to contribute the proportion of the capital for which he subscribes; but it does not bind him irrevocably as regards matters not required by the Act to be stated therein (59). A person who subscribes for preference shares may take an equivalent amount of ordinary shares instead (59).

(52) Peel's case (supra).

(53) Peel's case [1867] 2 Ch. App. 674; Sewell's case [1868] 3 Ch. App. 131; Campbell's case [1873] 9 Ch. App. 1, 22.

(54) Oakbank Oil Co. v. Crum [1882] 8 App. Cas. 65.

(55) Central Ry. Co. v. Kisch [1867] 2 H.L. 99 at p. 123; Downes v. Ship [1868] 3 H.L. 343.

(56) Ernest v. Nicholls [1857] 6 H.L.C. 401, 419; Campbell's case (supra); Mahony v. East Holyford Mining Co. [1875] 7 H.L. 869; Venkataswami v. Ramamurty [1934] M. 579, 67 M.L.J. 327; Charnock Collieries Co. v. Bholanath [1912] 39 Cal. 810.

(57) For cases see notes to S. 26 and Premier Industrial Bank v. Carlton Manufacturing Co. [1909] 1 K.B. 106.

(58) Sree Minakshi Mills v. Callianjee [1935] M. 799, 68 M.L.J. 510, 156 I.C. 570.

(59) Duke's case [1876] 1 Ch. D. 620.

**Construction:**—In construing the memorandum, it is not correct that articles must not at all be looked at. The articles constitute a contemporaneous document and may throw light on the meaning of the provisions of the memorandum and may explain the ambiguity, if there be any, in the memorandum (60). The principle must, however, be acted upon with great caution. Thus primarily the memorandum alone must be looked at for the purpose of ascertaining the objects of the company. It is only in case of ambiguity that the articles may be referred to for the very limited purpose of explaining the ambiguity (60).

**265. Respective spheres of memo. and articles:**—The memorandum of association, as Lord Cairns observes, "is as it were the charter, and defines the limitation of the powers of a company to be established, under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company and so accepting it, the articles proceed to define the duties, the rights and powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may, from time to time, be made. With regard therefore to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* of the directors, but *intra vires* the company" (61). Then again, "of the internal regulations of the company, the members of it are absolute masters, provided they pursue the course marked out in the Act, that is to say, holding a general meeting, and obtaining the consent of the shareholders, they may alter those regulations from time to time; but all must be done in the way of alteration subject to the conditions contained in the memorandum of association . . . . The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit" (62). But except in respect of such matters as must, by statute, be provided for by the memorandum of association, the latter is not to be regarded as the dominant document, but is to be read in conjunction with the articles (63). In this particular case, however, their Lordships of the Judicial Committee were unable to read the two documents together and held that as the reserve fund was created by the memorandum for the benefit and security of the preference shareholders and as the provisions of the memorandum with regard to it were neither ambiguous, nor in need of being supplemented, article 119 did not empower the directors to apply the said fund for the purposes therein mentioned (63).

**265A. Articles as contract:**—The articles constitute a contract not merely between the company and the members, but also between each individual member and every other member (64). As between the company and its members the con-

(60) *Syam Chand v. Calcutta Stock Exchange Assn., Ltd.* [1949] C. 337, [1945] 2 Cal. 313.

(61) *Ashbury Ry. Carriage &c., v. Riche* [1875] L.R. 7 H.L. 653 at p. 668.

(62) *Ibid.*, at p. 671.

(63) *Angostura Bitters Ltd. v. Kerr* [1933] A.C. 550, (P.C.), [1934] P.C. 89.

(64) *Eley v. Positive Assurance Co* [1876] 1 Ex. D. 20; *Salmon v. Quin & Axtens* [1909] 1 Ch. 311; *Gulab Singh v. Punjab Zamindara Bank* [1940] L. 243, 190 I.C. 819.

tract is in respect of their ordinary rights as members (65). A contract contained in the articles cannot be enforced by a person who is not a member (66), or even by a member except in so far as it relates to his position as a member (67). Even if a particular article is wide enough to make it apply to a dispute between the company and a member in his capacity of a director, this section does not give contractual force to the article in reference to such a dispute (68). "In *Hickman v. Kent Sheep Breeders' Assn.* (65) it was said : 'An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company' . . . . . No right merely purporting to be given by an article to a person, whether a member, or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, can be enforced against the company" (69). The rights arising out of such contracts can ordinarily be enforced through the company (70).

Anything in the articles which is inconsistent with the provisions of the Act is void (71). In the last noted case at p. 315 Lord Herschell observed as follows : "The articles constitute a contract between each member and the company and there is no contract in terms between the individual members of the company ; but the articles do not any the less, in my opinion, regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company or through the liquidator representing the company ; but I think that no member has, as between himself and another member, any rights beyond that which the contract with the company gives."

The articles, as provided in this section, constitute a contract between each member and the other members to observe the provisions of the articles. It follows that when some members of a company, it may be the majority of members, do not carry out the terms of that agreement, but they act contrary to the articles, one or more of the other members has or have the right to come to Court and ask for the agreement to be enforced against those members who have violated their obligations. In a suit by the minority shareholders concerning the affairs of the company the company can and indeed should be a party (72).

**266. Estoppel** :—Where the articles are not valid for want of registration, the company may be estopped from raising the plea of their invalidity against holders of hundis in due course (73).

**267. Social contract** :—The memorandum and the articles embody only the social contract between the shareholders *inter se*, and possibly between the shareholders and directors and do not constitute any contract between the company and its promoters (74).

(65) *Maneklal v. Suryapur Mills* [1928] B. 252, 52 Bom. 477, 30 Bom. L.R. 549 ; *Hickman v. Kent Sheep Breeders' Assn.* [1915] 1 Ch. 881 ; in this case all previous decisions were discussed. See also *Rameswar v. Calcutta Wheat & Seed Assn.* [1938] C. 89, 42 C.W.N. 161.

(66) *Browne v. La Trinidad* [1887] 37 Ch. D. 1.

(67) *Eley v. Positive Assurance Co.* (supra) ; *Browne v. La Trinidad* (supra).

(68) *Beattie v. E. & F. Beattie, Ltd.* [1938] Ch. 708 (C.A.).

(69) *Ibid.* where Sir Wilfrid Green quotes the passage with approval.

(70) *Mac Dougall v. Gardiner* [1875] 1 Ch. D. 13 ; *Burland v. Earle* [1902] A.C. 83.

(71) *Welton v. Saffery* [1897] A.C. 209.

(72) *Ramkissendas v. Satya Charan* [1946] 50 C.W.N. 310.

(73) *Kunj Kishore v. Baldeo Mills* [1914] 36 All. 416.

(74) *Ahmedabad Jubilee S. & M. Co. v. Chhotalal* [1907] 10 Bom. L.R. 141.



**268. Purpose of memo. & articles :—**The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, and not to bind him in his capacity as an individual (75). No article can constitute a contract between the company and a third person (76). A memorandum of association must be construed in its literal meaning (77).

**269. Implied contract :—**Though a memorandum and articles may not constitute a contract as between a promoter and the company, an implied contract may be provided by the acts of parties on the terms set out in the articles (78). Thus, where in pursuance of certain articles acted upon by the company a shareholder was appointed managing director and acted as such for 11 years and was remunerated in accordance with the terms set out in the articles, the articles constituted an implied contract between the company and the shareholder, so as to entitle him to a declaration that he was the managing director of the company (78).

**270. SUB-S. (2). "Debt due" :—**Under this sub-section the liability of the shareholders in respect of the balance due on their shares is undoubtedly a debt due from them to the company, the debt accruing due from the time when their liability commenced, that is, from the time when they first took up their shares. This liability is not however enforceable against the shareholders until a valid notice has been given to them in accordance with the articles (79). Though under this sub-section any money payable by a member becomes a debt when it is due under the articles or the memorandum, still the money does not become due merely because signatories of the memorandum or articles have undertaken to pay for the shares subscribed by them. There is a distinction between money which is due and money which is presently due and it is only money which is presently due which can be described as a debt. When there was no term by which the signatories were to pay the amount on a particular date, nor was any date fixed by the board of directors, but the shares were forfeited, it was held that the amount was not presently due and hence the shares were not liable to forfeiture (80).

In *Alexander v. Automatic Telephone Co.* (81) some directors sought to compel others to pay on their shares in the same proportion as had been paid by shareholders who were members of the public : it was held that the directors were not legally bound to make the payments, but that the Court of Chancery would compel them to pay upon the ground that they had been acting in contravention of the trust which had been reposed on them as directors of the company.

### 37. Provision as to companies limited by guarantee.—

(1) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of April, 1914, every provision in the memorandum or articles or in any resolution of the company purporting to give any

(75) *Bisgood v. Henderson's T. Estates* [1908] 1 Ch. 743.

(76) *Pritchard's case* [1873] 8 Ch. App. 956; *Famatina Development Corpn.* [1914] 2 Ch. 271.

(77) *Cotman v. Brougham* [1918] A.C. 514.

(78) *Gulab Singh v. Punjab Zemindara Bank* [1942] L. 47 (49), 43 P.L.R. 619 relying on *Isaac's case* [1892] 2 Ch. 158; *Beckwith's case* [1898] 1 Ch. 324 and *R. Solon & Co.* [1894] 3 Ch. 356.

(79) *Pabna Dhanabhandar Co. v. Foezuddin* [1932] C. 716, 59 Cal. 1186, 36 C.W.N. 589.

(80) *Vishwanath v. Holyland Cinetone, Ltd.* [1939] A. 789, [1939] A.L.J. 950.

(81) [1900] 2 Ch. 56.

person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of April, 1914, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

This section corresponds to s. 27 of the previous Act and s. 21 of the English Act of 1948. For the words "commencement of this Act" which refer to the commencement of the Act of 1913, the date on which that Act came into force, *viz.*, the 1st day of April, 1914, has been substituted—*Notes on Clauses*.

**38. Effect of alteration in memorandum or articles.**—Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member, if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date, to contribute to the share capital of, or otherwise to pay money to, the company :

Provided that this section shall not apply in any case where the member agrees in writing either before or after a particular alteration is made, to be bound by the alteration.

This section corresponds to s. 20A of the previous Act and s. 22 of the English Act of 1948. In the proviso the words "a particular alteration" have been substituted for the words "the alteration" so as to bring out the meaning clearly—*Notes on Clauses*. This was originally cl. 33 of the Bill. The words "whether directly or indirectly" therein after "at that date" have been deleted by the Joint Committee as being unnecessary (*vide* J. C. R., para 22).

This section provides that without the consent of a member he cannot be asked to subscribe for more shares, and his liability in respect of existing shares cannot be increased by amending the memorandum or articles.

**271. Scope** :—This section, in so far as it provides that a member is not bound by an alteration made in the articles after the date on which he became a member unless he has agreed in writing to be bound thereby, is limited to two things: (1) where the alteration requires him to take or subscribe for more shares than the number held by him at the date of the alteration, and (2) where it increases his liability to contribute to the share capital of, or otherwise to pay money to, the company (82).

**39. Copies of memorandum and articles etc. to be given to members.**—(1) A company shall, on being so required by a member, send to him within seven days of the requirement and subject to the payment of a fee of one rupee, a copy each of the following documents as in force for the time being—

- (a) the memorandum ;
- (b) the articles, if any ;
- (c) the agreement, if any, entered into or proposed to be entered into, by the company with any person appointed or to be appointed as its managing agent or as its secretaries and treasurers ; and
- (d) every other agreement and every resolution referred to in section 192, if and in so far as they have not been embodied in the memorandum or articles.

(2) If a company makes default in complying with the requirements of this section, the company, and every officer of the company who is in default, shall be punishable, for each offence, with fine which may extend to fifty rupees.

This section corresponds to s. 25 of the previous Act and s. 24 of the English Act of 1948. Power has been conferred in general terms on any company to reduce any fee or charge etc. payable to it (s. 636). Hence the omission of the words "or such less sum as the company may prescribe" which occurred in the old Act. In sub-s. (2) reference has been made to the officer of the company who is in default—compare s. 24 (2) of the English Act of 1948—*Notes on Clauses*. This was originally cl. 34 of the Bill, sub-s. (1) of which has been substantially altered by the Joint Committee.

**40. Alteration of memorandum or articles etc. to be noted in every copy.**—(1) Where an alteration is made in the memorandum or articles of a company, in the agreement referred to in clause (c) of sub-section (1) of section 39 or in any other agreement, or any resolution, referred to in section 192, every copy of the memorandum, articles, agreement or resolution issued after the date of the alteration shall be in accordance with the alteration.

(2) If, at any time, the company issues any copies of the memorandum, articles, resolution or agreement, which are not in accordance with the alteration or alterations made therein before that time, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ten rupees for each copy so issued.

This section corresponds to s. 25A of the previous Act. In sub-s. (1) reference has been made to certain resolutions and agreements which have also to be treated in the same way as articles of the company—*Notes on Clauses*.

**272. Wilful default:**—In s. 25A of the previous Act the words used were "who is knowingly and wilfully in default." "An act or omission to do an act is wilful where the person, of whom we are speaking, knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative, unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty" (83). If the neglect or default arises from the voluntary acts of the parties, either awake or asleep, with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, the neglect or default is wilful (84).

### *Membership of company*

**41. Definition of "member".**—(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

This section corresponds to s. 30 of the previous Act and s. 26 of the English Act of 1948.

**272A. "Member" and "shareholder"** :—The terms "member" and "shareholder" have the same meaning in this Act and the latter term has not been used in a different sense in the Income-tax Act (85).

**273. Who are members** :—The members of a company are those persons who collectively constitute the company. A member is not necessarily a shareholder, for an unlimited company or a company limited by guarantee may exist either with or without share capital (86). But in the case of a company limited by shares the terms "member" and "shareholder" are synonymous (87). The word "member" includes a deceased member so long as his name is on the register of members (88).

**274. Joint shareholder** :—In the case of a public company every joint shareholder is a member. When three or four persons agree to accept shares in a company, they do not constitute a single member (89).

**275. Contract of subscriber** :—"The contract of the subscriber of a memorandum of association," said Buckley J., "is of a very peculiar kind. Down to the

(83) City Equitable Fire Insurance Co. [1925] 1 Ch. 407 per Romer J. This view was affirmed by the Court of Appeal consisting of Pollock M. R., Warrington & Sargant, L. JJ.

(84) Elliot v. Turner [1843] 13 Sim. 477 at p. 485.

(85) Hindusthan Investment Corpn. v. Comr. of Income-tax [1955] C. 432.

(86) South London Fish Market Co. [1888] 39 Ch. D. 324 (C.A.).

(87) Palmer, 13th ed., p. 97.

(88) James v. Buena Ventura & Co. Syndicate [1896] 1 Ch. 456.

(89) Narandas v. Indian Manfg. Co. [1953] B. 433.

moment when the memorandum and articles are taken to Somerset House to be registered there is no contract at all, because the company does not exist, and any contract by the signatories must be with the corporation. At the moment of registration two things take place by force of the Companies Act, 1862; the company springs into existence, and the subscribers to the memorandum of association become by virtue of s. 23 of that Act (the present section), members of the company. There is no executory contract which is subsequently executed. There is no contract at all until the moment when the corporation and the character of membership in the signatories to the memorandum come simultaneously into existence. I must therefore hold that the subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentation of an agent of the company" (90). Again: "The contract effected by the signature of the memorandum and registration of the company is not merely a contract created between the subscriber and the company. It is a contract whose existence is the basis of the creation of the corporation as one of the contracting parties, and every other person who becomes a member becomes such on the footing that that contract exists" (91).

In the case of a subscriber of memorandum no allotment of shares is necessary, nor is the entry of his name on the register of members necessary. He becomes a member *ipso facto* on the incorporation of the company and liable as the holder of the share or shares he has subscribed for (92).

**276. Obligation of subscriber to memo.** :— Each subscriber to the memorandum of association irrevocably agrees to take from the company the number of shares placed opposite to his signature (93), and he becomes a member *ipso facto* whether his name is entered in the register or not (94), unless all the shares of the company have been duly allotted to others (95). This obligation is not satisfied by the allotment at a subsequent period of nominally fully paid shares (96). A person who subscribes the memorandum of association for a certain number of shares is bound to take that number of shares from the company and pay for them, either in money or money's worth; obtaining shares from a vendor who got them as paid up by his direction will not satisfy the obligation, and he would be placed on the list of contributories (97). The present of fully paid shares by a third party does not satisfy the subscriber's obligations in this respect. The issue of the certificate does not estop the company, so long as the certificate has not passed to a *bona fide* purchaser for value (98). When shares are available for allotment the fact that none has been allotted to the subscriber makes no difference, and the liquidator is entitled to hold him to the contract (98). A subscriber to the memorandum cannot repudiate his subscription on the ground that he was induced to sign by misrepresentation (99).

(90) Lord Lurgan's case [1902] 1 Ch. 707.

(91) Lord Lurgan's case (supra).

(92) Collector of Moradabad v. Equity Insurance Co. [1938] O. 197, 23 Luck. 210, [1948] O.W.N. 172.

(93) Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56; Drummond's case [1869] 4 Ch. App. 722; Pell's case [1870] 5 Ch. App. 11.

(94) J. H. Chandler & Co. [1926] 48 All. 580, 24 A.L.J. 691, [1926] A. 550 following Machine Exchange Co. [1888] 12 Bom. 311; Whitehead & Bros. Ltd. [1900] 1 Ch. 804; Lord Lurgan's case [1902] 1 Ch. 707; Vazirmal v. Makran Coast Steam Navgn. Co. [1938] S. 187; Official Liquidator v. Suleman, infra.

(95) Mackley's case [1875] 1 Ch. D. 247; Tuffnell's case [1885] 29 Ch. D. 421; Evan's case [1867] 2 Ch. App. 427; London P. C. Coal Co. [1877] 5 Ch. D. 525; Naraindas Lahoredas [1934] S. 39, 149 I.C. 869; Snell's case [1869] 5 Ch. App. 22; Hall's case [1870] 5 Ch. App. 707.

(96) South Blackpool Hotel Co. [1867] 4 Eq. 238.

(97) Forbes & Judd's case [1870] 5 Ch. App. 270; see also Pen-Alt. S. L. Mining Co. [1873] 28 L.T. 158.

(98) Elmore's case [1889] 13 Bom. 57.

(99) Lord Lurgan's case [1902] 1 Ch. 707.

Unless otherwise agreed, the subscriber is however only bound to pay when calls are made (1). The first portion of sub-s. (1) lays down a rule of substantive law and the second portion a rule of procedure (2). The words "shall be deemed to have agreed to become members of the company" mean that the subscribers of the memorandum are to be treated as having become members by the fact of the subscription (3). The first directors are bound to see that the allotment is made in their names. They cannot avoid their liability to pay for the shares by pleading their own default or negligence in not making the allotment to themselves (4). A subscriber to the memorandum cannot plead that he subscribed it subject to certain reservations (5).

**277. Liability of subscribers :—**The statutory liability of a subscriber to the memorandum of association commences with the signature, and it is not held in suspense until the memorandum is registered. There is no *locus penitentiae* up to the date of registration, and the subscriber cannot, acting independently of the others, cancel his signature even on the ground of misrepresentation of the promoter (6). He is liable, whether his name has been entered in the register of members or not (7). When a subscriber subsequently applies for and receives allotment of a number of shares, they may be treated as satisfaction *pro tanto* of his obligation under the memorandum (8). In a Madras case it has been held that even in the case of a subscriber to the memorandum of association, liability to pay for the shares does not arise, unless and until there is a valid allotment of the shares (9). But the correctness of the view is doubtful. In a recent Punjab case (10) the last cited case has been dissented from confirming the view taken by the author of this book.

Where the memorandum and the articles of association registered are not a true copy of the original signed by a person as subscriber, he is not a member of the company as a subscriber; nor is he a member under cl. (2) of the section as the agreement referred to therein must be one entered into after the company has been registered (11). Where a person after his signature, and before the memorandum was registered, gave notice to the promoters of the withdrawal of his signature, he was not a member (11). When a person signs a duplicate of the memorandum after the registration of the original, he does not thereby become a subscriber (12). But such signature may be equivalent to a proposal to take shares, and if accepted, he will be regarded as a member and will be liable to calls when entered on the register of members (13). He may however withdraw before his name is put on the

- (1) *Alexander v. Automatic Telephone Co.* (supra).
- (2) *J. H. Chaudler & Co* (supra).
- (3) *U. P. Oil Mills v. Jamna Prasad* [1933] A. 334, [1933] A.L.J. 233, followed in *Official Liquidator v. Suleman*, [1955] M. B. 106.
- (4) *Naraindas Lahore Das* (supra); *Bellerby v. Rowland & Marwood's Steamship Co.* [1902] 2 Ch. 14 at pp. 25, 27 and 32; *Trevor v. Whitworth* [1887] 12 App. Cas. 409; *Vazirmal v. Makran Coast S. Navgn. Co.* (supra).
- (5) *Sonardih Coal Co. v. Parmanand* [1928] 26 A.L.J. 347, 108 I.C. 451.
- (6) *Machine Exchange Co.* (supra); *Lord Lurgan's case* (supra); *Banwari Lal v. Kundan Cloth Mills* [1937] L. 527.
- (7) *Tyddyan & Co.* [1869] 20 L.T. 105; *Evan's case* [1867] 2 Ch. App. 427; *London P.C. Coal Co.* [1877] 5 Ch. D. 525.
- (8) *Gilman's case* [1886] 31 Ch. D. 420.
- (9) *Synemodellux v. Vannamuthu* [1938] M. 498, [1939] 1 M.L.J. 534.
- (10) *Universal Transport Co. v. Jagjit Singh* [1955] Punj 228 relying on *Hall's case* [1869] 5 Ch. App. 707, *Sidney's case* [1871] 13 Eq. 228, *Forbes' case* [1875] 19 Eq. 353 and *Florence Land & Public Works Co.* [1885] 29 Ch. D. 421.
- (11) *Guzrati S. & W. Co. v. Girdharlal* [1881] 5 Bom. 425.
- (12) *Bombay Electrical Co.* [1888] 13 Bom. 1.
- (13) *Bombay N. Manufacturing Co. v. Ahmed* [1889] 14 Bom. 196; see also *Bombay Electrical Co.*, supra.

register or an allotment is made to him (14). Acceptance in such a case may be by allotment of shares or by putting his name on the register of members; it cannot be inferred from the circumstances of the case (15). A person who agrees on the memorandum can repudiate his consent, if the memorandum itself, or at least a true copy of it, is not registered (16). The present of fully paid up shares by the promoter does not satisfy the obligation of the subscriber, nor does the issue of share certificate estop the company, so long as the certificate has not passed to a *bona fide* purchaser for value. The company in such cases can prove non-payment and claim the value of the shares (17). When there are shares available for allotment, the fact that none has been allotted to the subscriber makes no difference (15).

As the contract is to take the shares from the company, the obligation of a subscriber is not satisfied by taking them from some one else (18). Lapse of time will not relieve the subscriber (19). An alteration in the articles made after signature and before registration may discharge the subscriber from liability (20).

A subscriber remains a member of the company until such time as either he validly surrenders the shares or pays for the shares and validly transfers them to somebody else (21).

**278. Liability of shareholders for fraudulent misrepresentation of their agent, e. g., managing director or managing agent :** Where the managing director of a company was appointed on behalf of all the shareholders to negotiate the sale of their shares, they were responsible for any fraudulent representation he made in the course of those negotiations. A principal could not disclaim responsibility for fraudulent misrepresentations made by his agent, which though made before the agency commenced, the agent's knowledge continued to influence the other party after the former's appointment as agent and finally induced the other party to enter into the contract which the agent had been authorised to make, and did make, on behalf of the principal; it was the agent's duty, having made false representations, to correct them before the other party acted on them to his detriment. Where the agent continued to conceal the true facts, and so the representations were continuing representations, the other party, were entitled to recover (22).

The general principle of vicarious liability for fraudulent misrepresentation is now well settled "An innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud" (23). "Every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in him

(14) *Imperial Flour Mills Co. v. Lamb* [1888] 12 Bom. 647; see *Imperial Ice Manufacturing Co.* [1889] 13 Bom. 415. It was held in this case that where the defendant signed the duplicate of the memorandum of association he was not to be regarded as a shareholder and that ss. 23 (h) and 27 (e) of the Specific Relief Act do not apply to contracts to take shares.

(15) *Nusservanji's case* [1888] 13 Bom. 1.

(16) *Anandji v. Nariad Spinning & Weaving Co.* [1876] 1 Bom. 320.

(17) See *Nicol's case* [1885] 29 Ch. D. 421.

(18) *Migotti's case* [1867] 4 Eq. 238; *Fothergill's case* [1873] 8 Ch. App. 270; *Dent's case* [1873] 8 Ch. App. 768.

(19) *Levick's case* [1871] 23 L.T. 838; *Sydney's case* [1872] 13 Eq. 228; *Tooth's case* [1868] 19 L.T. 599.

(20) *Felgate's case* [1865] 2 De G. J. & S. 456; *Pell's case* [1867] 2 Ch. App. 674.

(21) *U. P. Oil Mills Co.* [1931] A. 701, 133 I.C. 424.

(22) *Briess v. Woolley* [1954] 1 A.E.R. 909 (H.L.).

(23) Per Lord Macnaghten in *Lloyd v. Grace, Smith & Co.* [1912] A.C. 735.

self when he makes the contract (24). "It is elementary law that no person can take advantage of the fraud of his agent" (25).

**279. When shares are deemed to be issued** :-- Shares subscribed by the signatories to the memorandum of association are deemed to be issued when the company is registered (26). It is not necessary, to create a liability, that his name should be returned to the Registrar of Joint Stock Companies (27). As regards other shares, when a person is entered on the register of members as a shareholder, the shares are regarded to have been issued to him, although he has not obtained the share certificate (28). In the case of subscribers to the memorandum of association, neither allotment or entry on the register is necessary (29); the only way he can possibly escape liability is by showing that all the shares have been duly allotted to other persons (30). A subscriber cannot repudiate the shares on the ground of misrepresentation, for at the time of his signature to the memorandum the company was not in existence (31).

**279A. Sub-s. (2)** :-- Sub-s. (2) contemplates two things : (1) an agreement, and (2) entry in the register of members. An agreement alone does not create the status of membership. It is a condition precedent to acquiring such status that the applicant's name should be entered in the register of members (32). How the name is to be entered in the register of members is laid down in s. 150. No doubt it is unnecessary in the resolution allotting shares and also in the letter of allotment to insert the distinctive numbers of the shares allotted. But when it comes to the making of an entry in the register of members in order that liability may attach under sub-s. (2), the distinctive numbers of shares should be mentioned (32).

It is not necessary to produce the order of allotment to prove the validity of an entry in the register, though it is desirable to do so (33).

**280. Application for shares and allotment** :-- An application for shares is an offer and like any other offer must not only be accepted, but the acceptance must be communicated to the person making the offer; hence a mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares has in fact been made (34). Where the answer to a letter of application for shares contained fresh terms, the two letters did not constitute a contract to take shares. An application for share certificate, which the person who made it never received, did not amount to the acceptance of the fresh terms (35). Where an unreasonable delay is made in making allotment and the letter of allotment is posted just before the company went into liquidation, it was held that the

(24) Per Bramwell, L.J. in *Wen v. Bell* [1878] 3 Fx.D. 238 quoted by Lord Macnaghten in *Lloyd v. Grace, Smith & Co.*, supra.

(25) Per Lord Moulton in *Mait v. Rio Grande Rubber Estates* [1913] A.C. 853 (872).

(26) *Dalton Time Lock Co. v. Dalton* [1892] 66 L.T. 704 (C.A.); *Simpson v. Heaton's Steel & Iron Co.* [1870] 23 L.T. 511.

(27) *Simpson & Heaton's Steel & Iron Co.*, supra.

(28) See Nicol's case [1885] 29 Ch. D. 421.

(29) Nicol's case [1885] 29 Ch. D. 421; *Alexander Automatic Telephone Co.* [1900] 2 Ch. 56.

(30) Mackley's case [1875] 1 Ch. D. 247; *Evan's case* [1867] 2 Ch. App. 427. See also *Tuffnell's case* [1885] 21 Ch. D. 421.

(31) *Lord Lurgan's case* [1902] 1 Ch. 707.

(32) *Karachi Oil Products v. Narendra Singhji* [1948] 3 D.L.R. 9 (Bom.), [1950] B. 149, 51 Bom. L.R. 1012.

(33) *Lakshmi Narasa v. Official Receiver* [1951] M.L.J. 488.

(34) *Bellary Electric Supply Co. v. Kanniram* [1933] M. 320, 64 M.L.J. 130, 141 I.C. 120; see also *Universal Banking Corpn.* [1867] 3 Ch. App. 40; *Rolling Stock Co. of Ireland* [1866] 1 Ch. App. 567.

(35) *Beck's case* [1874] 9 Ch. App. 392.



applicant for the shares was not a member (36). When an agent of a company asks a person to take shares and the latter signs an application, the proposal comes from the company and is accepted by the other party; thus, there is a complete contract under ss. 2 (a) and (b), 3 and 10 of the Indian Contract Act. Where an application for shares is subject to a condition precedent, that condition must be fulfilled (37). But where the application is subject to a condition subsequent, such as that the applicant need not pay for the shares unless dividend is paid, the liability arises, although the condition is never fulfilled. A person who takes shares on the condition that "in the event of the company not making a profit, shares were not to be paid for at all" is a "bogus" shareholder and this is opposed to the whole object of the Companies Act (38). As to an application for shares by an agent, see the cases noted below (39).

In all cases where a condition is in dispute, the Court should look at the intention of the party applying for the shares and decide whether it was his intention to become a member *in presenti* or only *in futuro* after the condition had been fulfilled (40).

**281. How membership is constituted :—**A person may become a member of a company in the following ways: (1) by subscribing the memorandum of association, (2) by agreeing with the company to take a share or shares and being placed on the register of members; (3) by taking a transfer of a share or shares and being placed on the register of members; (4) by registration on succession to a deceased or bankrupt member; (5) by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member (41).

In order to constitute membership, entry in the register of members under section 150 is necessary (42), except in the case of signatories to the memorandum, or where there is a subsisting contract to take shares capable of being specifically enforced (43). A person who is not entered on the register will be liable if he has agreed to become a member, for the register can be rectified by placing his name on it. On the other hand, a person whose name is wrongfully removed from the register remains a member (44). If a person who has not agreed to take shares is put on the register, he does not become a member (45). The entry of a person's name on the register casts the onus on that person to prove that he was not duly a member of the company (46). Upon winding up of the company he will be put on the list of contributories if he knew that he was entered in the register of members and took no steps to have his name removed (46).

**(282) Liability of member :—**The purchaser of shares is governed by the same law as the purchaser of goods. Every person who has agreed to be a member is liable to pay the price of the share in accordance with the articles of association, unless such person is induced to enter into the contract by fraudulent misrepresentation.

(36) *Radhe Sham Beopar Co. v. Prabh Dyal* [1936] L. 16, 161 I.C. 294; *Ramsgate Hotel Co. v. Montefiore* [1866] 13 L.T. 715.

(37) *Mahendra v. Lachman* [1913] 35 All. 538; *Indian Merchants Bank v. Jogindra Singh* [1928] L. 234, 108 I.C. 192; *Ibid v. Anup Chand* [1928] L. 236, 107 I.C. 492.

(38) *Motilal v. Thakorelal* [1912] 36 Bom. 557, 11 Bom. L.R. 648.

(39) *Bird's case* [1864] 1 De G. J. & S. 200; *National Coffee Palace Co.* [1883] 24 Ch. D. 367.

(40) *Mahaluxmi Bank v. Assam Corporated Bank* (1955) N.U.C. 3634 (Ass.).

(41) *Collector of Moradabad v. Equity Insurance Co.* [1948] O. 197, 23 Luck. 210, [1948] O.W.N. 172; see also *Karachi Oil Products v. Narendra Singh* [1948] 3 D.L.R. 9 (Bom.).

(42) *Mac Donald, Sons & Co.* [1894] 1 Ch. 89 (C.A.).

(43) *Winstone's case* [1879] 12 Ch. D. 239; *Arnot's case* [1887] 36 Ch. D. 702, 707.

(44) *Barton v. London & N. W. Ry. Co.* [1890] 24 Q.B.D. 77.

(45) *Ormerode's case* [1894] 2 Ch. 474.

(46) *Amar Singh v. Khalsa Bank* [1933] L. 108.

tation in which case he is entitled to rescind the contract provided he does so within a reasonable time. The misrepresentation must be of a material fact, the shareholder must have been induced by it and he must plead and prove it (47).

**283. Oral application and withdrawal** :—An oral application for shares is as effectual as a written application (48). Withdrawal may also be made by word of mouth (49). If a person applies for shares verbally and pays what is necessary and has the shares allotted to him, he becomes a shareholder (50). Withdrawal by post is not effective unless it reaches the company before the notice of allotment is actually posted (51). An applicant for shares can withdraw at any time before his offer has been accepted (52). An offer is deemed to be accepted as soon as the allotment letter is posted (53). If the allotment letter contains any term which was not in the application, there is no contract (54). If after the application an allotment is not made within a reasonable time, the applicant is not bound to accept the shares (55). The application may be made to the company's agent (56).

**284. Authority "coupled with interest"** :—An agent is held out as having authority and he can apply for shares in the principal's name (57); and if the shares are allotted in the principal's name, he becomes a shareholder (58). Where a company makes allotment of shares on the written authority of a person, he may be estopped from saying that the authority was limited by private instructions (59). But an application by a person not having authority does not make the supposed principal a member (60). An authority coupled with an interest, e.g., given for valuable consideration, is irrevocable and an underwriting letter containing authority for some person to apply in the name of the underwriter, when duly accepted, cannot be revoked (61).

**285. Contracting without authority** :—A person who purports to contract as agent for another, not having authority, does not himself become a member, but is liable to the company in damages for breach of warranty of his authority (62). There is no contract where an agent applies by mistake in the name of the principal in the

(47) *Shiromani Sugar Mills v. Debi Prasad* [1950] A. 508.

(48) *Cockney's case* [1850] 3 De G. & J. 170; *Bloxam's case* [1864] 4 De G. J. & S. 447; *Levita's case* [1867] 3 Ch. App. 36; *Olympic Re-insurance Co.* [1920] 1 Ch. 382, on appeal 2 Ch. 341.

(49) *Truman's case* [1894] 3 Ch. 272.

(50) *New Theatre Co.* [1864] 33 Beav. 529.

(51) *Byrne & Co. v. Van Tienhoven* [1880] 5 C.P.D. 344; *Henthorn v. Fraser* [1892] 2 Ch. 27. If the letter is posted to some one else, not an agent, it is not effective; see *Hebb's case* [1867] 4 Eq. 9.

(52) *Ritso's case* [1877] 4 Ch. D. 774; *Wilson's case* [1869] 20 L.T. 962; *Dickinson v. Dodds* [1876] 2 Ch. D. 463; *Pellatt's case* [1867] 7 Ch. App. 527, 535 where Lord Justice Cairns said: "Where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company; otherwise there is no contract." But where the applicant has a right to allotment, the application makes the contract; see *Tucker's case* [1874] 41 L.J. Ch. 157; *Adam's case* [1872] 13 Eq. 474.

(53) *Household Fire & Insurance Co. v. Grant* [1879] 4 Ex. D. 216, 41 L.T. 298.

(54) *Duke v. Andrews* [1848] 2 Ex. 290.

(55) *Carmichael's case* [1896] 2 Ch. 643; Ex p. *Bailey* [1868] 3 Ch. App. 592.

(56) *Forget v. Cement Products Co.* [1916] W.N. 259.

(57) *Levita's case* [1870] 5 Ch. App. 489; *Duff's Executor's case* [1886] 32 Ch. D. 301; *Henry Bentley & Co.* [1893] 69 L.T. 204.

(58) Ex p. *Harrison* [1898] 69 L.T. 204, [1896] 2 Ch. 643; *Hindley's case* [1896] 2 Ch. 121.

(59) *Henry Bentley & Co.* (supra).

(60) *Coventry's case* [1891] 1 Ch. 202.

(61) Ex p. *Harrison* (supra); *Hindley's case* (supra); *Olympic Re-insurance Co.* [1920] 2 Ch. 341.

(62) *National Coffee Palace Co.* [1883] 24 Ch. D. 367.

wrong company, or where by the fraud of the company (45) or of its agent the applicant is led to believe that he is contracting with a different company (63).

**286. Infant's agreement** :—In England an infant's agreement to take shares is voidable at his election on his attaining majority (64). But if the shares are registered in his name, and after attaining majority he acts as shareholder (65), or does not within a reasonable time repudiate the shares, he cannot afterwards do so (66). Under the Indian Contract Act an infant's contract is however altogether void (67). But a transfer in favour of a minor is not void (68) although a contract to take share on behalf of a minor cannot be specifically enforced either for or against him (69). So it appears that a minor may become a shareholder if shares are transferred to him (65); but the company may refuse to accept him as a shareholder (70). Even where after the transfer, the minor's name was placed on the register in ignorance of his minority, the official liquidator could refuse to accept him as a shareholder, although after coming of age the minor was willing to confirm the transfer (71). Where a director procured an allotment to his infant children who were at the time of winding up of the company still minors, he was held liable to make good the loss caused to the company by its inability to enforce calls (72); for a transferee is liable for the unpaid balance on his shares (73). It has been held that a minor could be a member under Act VI of 1882 (74). If he intentionally permits the company to believe him to be a shareholder and in that belief to pay him dividends since he attained majority, he is estopped by his conduct from denying that he is a shareholder (74). If the minor repudiated his shares on attaining majority, he could not recover any sum he had paid to the company in respect of the shares (75); but he could not, even while an infant, retain the shares without accepting the burdens, e.g., the liability for calls (76).

**287. Application in a fictitious name** :—If a person apply for shares in a fictitious name and shares are allotted in that name, he will be liable as a member (77). The same result follows where the application is made in the name of a person incapable of accepting the shares (78). In these cases however there must be an intention of contracting (79). A person who agrees to place shares does not become a member (80).

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- (63) *International Society of Auctioneers*, Baillie's case [1898] 1 Ch. 110.  
 (64) *Hamilton v. Vaughan Sherrin & Co.* [1894] 3 Ch. 589; *Laxon & Co.* [1892] 3 Ch. 555.  
 (65) *Lumsden's case* [1868] 4 Ch. App. 31; it was held in this case that a transfer to an infant is not void but voidable.  
 (66) *Ebert's case* [1870] 5 Ch. App. 302.  
 (67) *Mohori Bibi v. Dharmadas Ghose* [1903] 30 Cal. 539, 30 I.A. 114.  
 (68) *Raghava v. Srinivasa* [1917] 40 Mad. 308 (F.B.); *Madhab v. Baikuntha* [1919] 4 Pat. L.J. 682; *Ulfat v. Gouri Sanker* [1911] 33 All. 657; *Narain Das v. Musst. Dhanja* [1916] 38 All. 154; *Munni Kunwar v. Madan Gopal* [1916] 48 All. 62; *Hari Mohan v. Mohini* [1916] 22 C.W.N. 130.  
 (69) *Mir Sarwarjan v. Fakhruddin* [1912] 39 Cal. 232 (P.C.), 59 I.A. 1.  
 (70) *Symon's case* [1870] 5 Ch. App. 298.  
 (71) *Symon's case* (supra).  
 (72) *Crenver & Co., exp. Wilson* [1873] 8 Ch. App. 45.  
 (73) *Weickersheim's case* [1873] 8 Ch. App. 831.  
 (74) *Fazlbhoy v. Credit Bank* [1914] 39 Bom. 331; see also *Yoland Consols Ltd.* [1888] 58 L.T. 922.  
 (75) *Steinberg v. Scala (Leeds) Ltd.* [1923] 2 Ch. 452, overruling *Hamilton v. Vaughan Sherrin & Co.* (supra).  
 (76) *North-West Railway Co. v. M' Michael* [1850] 5 Ex. 114.  
 (77) *Klondyke Gold Co.* [1899] W.N. 1.  
 (78) *Pugh & Sharman's case* [1872] 13 Ex. 566.  
 (79) *Cundy v. Lindsay* [1878] 3 App. Cas. 459; *Coventry's case* [1891] 2 Ch. 202 (C.A.).  
 (80) *Gorissen's case* [1873] 8 Ch. App. 507.

**288. A company becoming member of another company** :—A company may become a member of another company, if the former is authorized by its memorandum of association to take shares, or if it takes the shares in payment of a debt by way of compromise (81). But a company cannot acquire its own shares, even if expressly authorized so to do by its memorandum (82). A partnership firm is not a "person" (83), and the partners have no right to be registered as members in the firm name (84).

**289. Mortgagee of shares** :—A person, who lends money to a company on a mortgage of its shares, may become liable as a member in respect of those shares, if he takes the shares on condition that upon repayment the shares will be transferred to a nominee of the company (85).

**290. Contract to take shares** :—In the case of an ordinary member of the public, the contract to take shares is complete when an application has been submitted and allotment on the footing of that application has been made and the notice of the allotment has been communicated to the applicant (86). In the case of a director the company is under obligation to allot shares. In such cases it often happens that the company is regarded as making an offer to the director to take shares; the director's subsequent application for shares is an acceptance of that offer, and when the application is made, the contract is complete (87). Where a director has been given shares, or shares have been transferred to him as qualification for his directorship, it makes the transferee a member of the company. And if such person hold out that he is a shareholder, he is estopped from denying his membership, where the company goes into liquidation, on the ground that the transfer was a mere colourable transaction (88). Where a person who consents to become a shareholder on condition that his suggestions will be included in the memorandum and articles of association, and despite the promoters' failure to carry out the suggestions he signs the usual application for shares and becomes a shareholder, it is not open to him subsequently to object to his being a shareholder on the ground of the conditions aforesaid not having been fulfilled. The proper time to raise the objection was at the time of incorporation of the company (89). A valid executory contract for the allotment of shares is constituted by offer and communicated acceptance before allotment is made. If however, the only facts are that there is application for shares and nothing further is done by the company but allotment, there is no conclusive contract until the allotment is communicated to the applicant (90). The general rule is that there can be an acceptance of an offer by the communication of the assent of the person to whom the offer is made or by his doing some act or by his accepting performance itself of the act constituting the offer. But mere silence cannot amount to an assent nor does it amount to any representation on which a plea of estoppel may be founded. It is only when there is a duty to disclose some fact or to do some act that deliberate silence may amount to a representation (91).

If there was in fact no contract to take shares, the supposed member can at any time (*i.e.*, before the rights of creditors have intervened on winding up) have his

(81) *Lands Allotment Co.* [1894] 1 Ch. 616.

(82) *Trevor v. Whitworth* [1887] 12 App. Cas. 409; s. 77.

(83) *Sadler v. Whiteman* [1910] 1 K.B. 868 at p. 889.

(84) *Vagliano A. Collieries* [1910] W.N. 187, 103 L.T. 211; but see *Weikersheim's case* (*supra*).

(85) *Addison's case* [1870] 5 Ch. App. 294.

(86) *Shiromani Sugar Mills v. Debi Prasad* [1950] A. 508.

(87) *Sadiq Hasan v. Munita Bank* [1929] L. 656, 123 L.C. 92.

(88) *Mulk Raj v. Peoples Bank of Northern India* [1936] L. 480.

(89) *In re East Bengal Sugar Mills* [1941] C. 143, [1941] 2 Cal. 175.

(90) *Bai Mangu v. Bharat Khand Cotton Mills Co.* [1930] P.C. 134, 32 Bom. L.R. 812.

32 C.W.N. 585, 51 C.L.J. 439; *Gunn's case* [1867] 3 Ch. App. 40.

(91) *Bank of India v. Rustum Fakirji* [1955] B. 419, 57 Bom. L.R. 850.

name removed from the register, for he was never really a member (92). A shareholder cannot have his contract to take shares set aside after the commencement of winding up proceedings, unless he has repudiated and taken proceedings to repudiate them before such commencement (93). Where a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, it is inconsistent with his position as a shareholder, when he remains as such, to claim back any of that money on the plea that the managing director falsely told him that the shares were sold (94). The repudiation or avoidance of a contract to take shares on the ground of undue influence, fraud or misrepresentation, must be made by the shareholder within a reasonable time and before the commencement of the winding up proceedings (95). Mere placing the name on the share register is not sufficient to fasten liability on a person who had no knowledge (96). A few months before the decision in *Oakes v. Turquand* (97) it was decided by the House of Lords that where a person was induced to take shares by fraudulent misrepresentation, he was never a member and was entitled to repudiate and treat as null and void all which he was induced to do (98). But this case was distinguished in *Oakes v. Turquand* (97) on the ground that the former was a case between a shareholder and the company, and it had no application to a case where the question was between a shareholder and the creditor (99).

The rule that to make a binding contract to take shares there must be application, allotment and communication of allotment to the allottee, applies as strongly to a person who applies as a trustee as to one who applies on his own behalf (1).

When a person contracts to take shares, equity will enforce the contract and compel him to do acts which are necessary under the Act to make him shareholder at law (2).

Although the contract under which a person took shares could not have been enforced against him, but where he had, with knowledge that his name was on the register, dealt with them as if he had been a member and assented to keep them, he was liable to pay the whole amount of the shares in cash notwithstanding his misapprehension as to the legal effect of the contract he had originally entered into (3). A contract to take shares cannot be vitiated because a collateral agreement happens to be unenforceable in law (4). Motive can never be enquired into in considering the validity or otherwise of a contract (5). But where it is impossible to sever the contract from an illegal contract for the payment of the purchase price, the two documents in fact constituting one contract, the company is not entitled to recover the price of the shares (6).

One partner can accept shares so as to bind the firm (7).

When shares are subscribed by a person on a certain condition, if that condition is not fulfilled, he cannot be regarded as a member but may be a creditor (8).

(92) *Oakes v. Turquand* [1867] L.R. 2 H.L. 325; *Alabaster's case* [1860] 7 Eq. 273.

(93) *Hakim Rai v. Kharak Singh* [1917] 46 I.C. 21, 42 P.L.R. 1918.

(94) *Narottam v. Indian Specie Bank* [1917] 42 Bom. 264.

(95) *In re Jagannath Prasad* [1938] A. 193.

(96) *Alabaster's case* (supra).

(97) *Oakes v. Turquand* [1867] L.R. 2 H.L. 325; *Alabaster's case* [1860] 7 Eq. 273.

(98) *Venezuela Ry. Co. v. Kisch* [1867] L.R. 2 H.L. 99.

(99) *Oakes v. Turquand* (supra) at p. 367.

(1) *Robinson's Case* [1869] 20 L.T. 96.

(2) *New Brunswick &c. Land Co. v. Muggeridge* [1860] 1 Dr. Sm. 363.

(3) *Railway T. T. Publishing Co.* [1889] 42 Ch. D. 98.

(4) *Dehra Dun Mussorie Electric Tramways Co.* [1930] A. 357, 52 All. 406, [1930] A.L.J. 139.

(5) *Ibid*; *Thomas v. Thomas* [1877] 2 Q.B. 358.

(6) *Kenyon v. Darwen Cotton Manfg. Co.* [1936] 2 K.B. 193.

(7) *Weikersheim's case* [1873] 8 Ch. App. 831.

(8) *Mahendra v. Lachman* [1913] 35 All. 538.

Two separate applications for membership made by two intending members do not give rise to a contract between them but result, on acceptance by the company, in two distinct contracts between the company and each of the applicants (9).

**291. Specific performance of contract for shares** :—The Court has jurisdiction to decree specific performance of a contract by a person to take of by a company to allot, shares, but the matter is one of judicial discretion. Where the suit is brought after a great delay, the Court in its discretion would not decree specific performance, though the suit is within the period of limitation (10).

**292. Inchoate title** :—Where a person has neither a complete legal title to the shares, nor as between himself and the company an unconditional right to be registered as a shareholder, his title being inchoate only, it is not sufficient to defeat the pre-existing equitable title of another person (11).

**293. Illegal contract** :—"No Court", observed Lord Justice Lindley, "ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him" (12).

**294. Making market for shares** :—An agreement between two or more persons to purchase shares in a company, in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the facts, that there was a *bona fide* market for its shares, and that the shares were at a real premium, is an illegal transaction, and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares (13).

**295. Cesser of membership** :—Cesser of membership takes place by the sale of the share and entry on the register of members the name of the purchaser, and valid surrender or forfeiture of the share. The membership of a mutual benefit fund is not terminated by the mere appropriation of the share capitals of a member towards the amount due by him to the fund in the absence of forfeiture (13). Where persons holding fully paid up shares in a bank surrendered their shares, after the bank had gone into voluntary liquidation, to another company and in lieu thereof received preference shares in the said company which meanwhile, by an arrangement evidenced by an instrument that had not been registered, had taken over the assets of the bank in liquidation, it was held that those persons had ceased to be members of the bank and that any meeting convened or proceedings taken by them as shareholders or contributories of the bank were invalid and inoperative (14).

**296. Rights of a member** :—The rights of a member are—(1) statutory, (2) given by the memorandum and articles of association and (3) given by the general law, especially that relating to contracts and members of corporations. The statutory right cannot be taken away or modified by any provision in the memorandum or the articles (15).

(9) *Khusiram v. Hanutmal* [1949] 53 C.W.N. 505.

(10) *Karachi Oil Products Ltd. v. Narendrasinghi* [1950] B. 149, 51 Bom. L.R. 1012.

(11) *Roots v. Williamson* [1888] 38 Ch. D. 485.

(12) *Scot v. Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724; *Reg. v. Aspinall* [1876] 36 L.T. 297.

(13) *Venkatesam v. Rama Rao* [1936] M 97.

(14) *Hunter v. Damodar Das* [1924] 22 A.L.J. 719.

(15) *Peveril Gold Co.* [1898] 1 Ch. 122 (C.A.).

A member has the right of claiming injunction to restrain the company from acting on an *ultra vires* resolution, even if he has himself been a party to the passing of the resolution and has assented to previous illegal acts done under it (16).

A minority of the members has a right to sue a shareholder for misappropriation of the company's goods, even though the majority approved of his acts (17). No shareholder has any right to any item of the company's property (18).

As to the position of a person who has been induced to take share by the misrepresentation of the company or its agents, see notes to ss. 56 and 62.

For the right of a bearer of share warrant to be regarded as a member, see s. 115.

For cases relating to allotment of shares, see notes to s. 69.

**297. Expulsion of member :** Where a company by resolution expels a member from the membership of the company, and the articles of association do not empower such expulsion so as to deprive the expelled member of his share, the resolution of expulsion has no effect, inasmuch as while the expelled member remained a shareholder, he must also remain a member (19).

**42. Membership of holding company.—**(1) Except in the cases mentioned in this section, a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void.

(2) Nothing in this section shall apply—

(a) where the subsidiary is concerned as the legal representative of a deceased member of the holding company ; or

(b) where the subsidiary is concerned as trustee, unless the holding company or a subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money.

(3) This section shall not prevent a subsidiary from continuing to be a member of its holding company if it was a member thereof either at the commencement of this Act or before becoming a subsidiary of the holding company, but, except in the cases referred to in sub-section (2), the subsidiary shall have no right to vote at meetings of the holding company or of any class of members thereof.

(4) Subject to sub-section (2), sub-sections (1) and (3) shall apply in relation to a nominee for a body corporate

(16) *Moseley v. Koffylfontein Mines* [1910] 2 Ch. 382.

(17) *Vadital v. Maueklal* [1925] B. 188, 49 Bom. 291, 27 Bom. L.R. 48.

(18) *Macaura v. Northern Assurance Co.* [1925] A.C. 619, 625.

(19) *Madhava v. Canara Banking Corpn.* [1941] M. 354, [1941] M.W.N. 28, [1940] 2 M.L.J. 937.

which is a subsidiary, as if references in the said sub-sections (1) and (3) to such a body corporate included references to a nominee for it.

(5) In relation to a holding company which is either a company limited by guarantee or an unlimited company, the reference in this section to shares shall, whether or not the company has a share capital, be construed as including a reference to the interest of its members as such, whatever the form of that interest.

This was originally cl. 37 of the Bill, sub-s. (3) of which has been substantially altered by the Joint Committee.

**298.** This section is new and corresponds to s. 27 of the English Act of 1948 which has been incorporated in accordance with the C. L. C.'s recommendation in para. 40 of their Report—*Notes on Clauses*. "Under this section of the English Act, no subsidiary or its nominee can in future become a member of its holding company, except as a personal representative or a trustee. In the latter case, neither the holding company nor the subsidiary may have any beneficial interest under the trust except by way of security for the purpose of a transaction entered into in the ordinary course of a business, which includes the lending of money. In regard to subsidiaries, which are already members of their holding companies, they are permitted to retain their membership but can exercise no voting rights in future, except where they are personal representatives or trustees. Further, any allotment or transfer of shares in a company to its subsidiary is declared to be void. These salutary provisions constitute an attempt to maintain the separate operational identity of a holding company and its subsidiary and thereby to preserve the respective shareholders' control over them. In the absence of any such provision the affairs of a holding company and its subsidiary may, in the hands of unscrupulous company managers, become inextricably involved and confused to the serious detriment of shareholders"—C. L. C. R., para 40.

**299. Legal representative :—**The expression "legal representative" has neither been defined in the present Act nor in the General Clauses Act, 1897. It has been defined in the Code of Civil Procedure, s. 2 (11) as "a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued." The last portion of this clause is wide enough to cover a coparcener who gets property by survivorship (20).

In England the primary meaning of the expression was "executors" or "administrators" in their official capacity (21), but it may be controlled by context and generally means "next of kin" when the individuals so indicated are to take beneficially (22).

In India after many conflicting decisions the meaning of the expression was extended to include heirs and also persons who in law represent the estate of the deceased person (23).

(20) *Gyan Datt v. Sada Nand* [1938] A.L.J. 56; *Ganesh v. Narayan* [1931] 55 Bom. 709; *Jamburao v. Annappa* [1940] 42 Bom. L.R. 1066. But see *contra* *Chuni Lal v. Bai Mani* [1918] 42 Bom. 504; *Atul v. Nandanji* [1935] 14 Pat. 732.

(21) *Price v. Strange* [1882] 6 Madd. 159.

(22) *Bridge v. Abbot* 3 Br. C. C. 224; *Cotton v. Cotton* 8 L.J. Ch. 349.

(23) *Dina Moni v. Elahadut Khan* 8 C.W.N. 843. See also *Amarchandra v. Sebak Chand* 11 C.W.N. 593, 34 Cal. 642 (F.B.).



### *Private companies*

**43. Consequences of default in complying with conditions constituting a company a private company.**—Where the articles of a company include the provisions which, under clause (iii) of sub-section (1) of section 3, are required to be included in the articles of a company in order to constitute it a private company, but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act shall apply to the company as if it were not a private company :

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.

This and the following section correspond to s. 154 of the previous Act and ss. 29 and 30 respectively of the English Act of 1948. They have been placed here in accordance with the arrangement in the English Act *Notes on Clauses*

For the privileges etc. of a private company see Notes 112 and 113 *ante*.

**300. Conversion of a private company into a public company and vice versa** :—By complying with the provisions of this section a private company can be converted into a public company. But there is no corresponding provision for converting a public company into a private company either in this Act or in the English Act. In England, it appears, a considerable number of existing companies have, by altering their articles, become private companies under the statute (24). "In order to convert an existing company into a 'private company', it is necessary to pass a special resolution altering the company's articles so as to limit the number of members, to prohibit any invitation to the public to subscribe for its shares, debentures or stock, and impose restrictions on the transfer of its shares: These alterations will satisfy the statutory definition but they are not the only alterations requisite. The articles generally must be considered, for there may be other provisions inconsistent with those indicated, and they must be altered accordingly. For example power to issue share warrants to bearers must be struck out" (25). See s. 3 (1) (iii) and notes thereto.

In this connection see the decision of the Patna High Court in *Radiant Chemical Co., Ltd.* (26), where it was held as follows: S. 154 (of the old Act) was based on the assumption that the conversion of a private company into a public company could be made by proper alterations in the articles of the company. The purpose of s. 154 was to ensure that when the company had been converted from a private company to a public company, certain information must be sent to the

(24) Gore Browne, 36th ed., p. 456

(25) Palmer, 13th ed., p. 392; Hals. (Halsb.) ed [1932] p. 133.

(26) [1943] P. 278, 22 Pat. 204—per Harris C. J. & Brough J.

registrar of joint-stock companies, and if such was not done, certain penalties were provided. There was nothing in s. 154 from which it could be inferred that a public company could not be converted into a private company by alteration of its articles. There was no need for a specific section to deal with such conversion, because the information which s. 154 required to be sent to the registrar need not be sent where the conversion was from a public company into a private one. In short where such a conversion took place, there was no need for a section corresponding to s. 154. It was not necessary to wind up the company and reconstitute it. By reason of s. 82 (of the old Act) the registrar was bound to file the amendments made in the articles of association of the company.

The absence of a provision corresponding to this section does not debar the conversion of a public company into a private company, and such conversion is permissible and valid (27). A resolution to convert a public company into a private company, if *bona fide* and in the interest of the company as a whole and consistent with the objects in the memorandum, binds the dissentient shareholders (28).

**44. Prospectus or statement in lieu of prospectus to be filed by private company on ceasing to be private company.—**(1) If a company, being a private company, alters its articles in such a manner that they no longer include the provisions which, under clause (iii) of sub-section (1) of section 3, are required to be included in the articles of a company in order to constitute it a private company, the company—

(a) shall, as on the date of the alteration, cease to be a private company; and

(b) shall, within a period of fourteen days after the said date, file with the Registrar either a prospectus or a statement in lieu of prospectus, as specified in sub-section (2).

(2) (a) Every prospectus filed under sub-section (1) shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(b) Every statement in lieu of prospectus filed under sub-section (1) shall be in the form and contain the particulars set out in Part I of Schedule IV, and in the cases mentioned in Part II of that Schedule, shall set out the reports specified therein, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(c) Where the persons making any such report as is referred to in clause (a) or (b) have made therein, or have,

(27) *Bai Rambha v. Master Silk Mills* [1955] N.U.C. 907 (Sau.).

(28) *Ibid* relying on [1927] 2 K.B. 9.

without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of Schedule II or clause 5 of Schedule IV, as the case may be, the prospectus or statement in lieu of prospectus filed as aforesaid, shall have endorsed thereon or attached thereto, a written statement signed by those persons, setting out the adjustments and giving the reasons therefor.

(3) If default is made in complying with sub-section (1) or (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

(4) Where any prospectus or statement in lieu of prospectus filed under this section includes any untrue statement, any person who authorised the filing of such prospectus or statement shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the filing of the prospectus or statement believe, that the statement was true.

(5) For the purposes of this section—

(a) a statement included in a prospectus or a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included ; and

(b) where the omission from a prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, the prospectus or statement in lieu of prospectus shall be deemed, in respect of such omission, to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(6) For the purposes of sub-section (4) and clause (a) of sub-section (5), the expression "included" when used with reference to a prospectus or statement in lieu of prospectus, means included in the prospectus, or statement in lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein.

See notes to the last section. The new sub-s. (6) has been inserted by the Joint committee to clarify the meaning of "included" as used in different places of this section (*vide* J.C.R., para 23).

In sub-s. (3) after the words "five hundred rupees" the words "for every day during which the default continues" have been inserted by the Lok Sabha.

*Reduction of Number of Members below Legal Minimum.*

**45. Members severally liable for debts where business carried on with fewer than seven, or in the case of a private company, two members.**—If at any time the number of members of a company is reduced, in the case of a public company, below seven, or in the case of a private company, below two, and the company carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

This section corresponds to s. 147 of the previous Act and s. 31 of the English Act of 1948. It has been thought best to place it here—*Notes on Clauses*.

**300A.** If the number of members is reduced below the requisite number, the company may also be wound up by the Court (29).

The representatives of a deceased or bankrupt member and past members should not be counted in estimating the number of members (30).

*Contracts and deeds, investments, seal etc.*

**46. Form of contracts.**—(1) Contracts on behalf of a company may be made as follows :—

(a) a contract which, if made between private persons, would by law be required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged ;

(b) a contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(29) S. 433, cl. (d).

(30) *Vide* *Bowling & Welby's Contract* [1895] 1 Ch. 663.

## (2) A contract made according to this section shall bind the company.

This section corresponds to s. 88 of the previous Act and s. 32 of the English Act of 1948. This was originally cl. 41 of the Bill. In sub-s. (2) the last words "and all other parties thereto" have been deleted by the Joint Committee.

**301. Contract how made—without seal :—**This section enables a company as a general rule, to make a contract without affixing the company's common seal thereto, as is in some cases under the English Act and was the case under the previous Indian Act VI of 1882, s. 67. Even under the English Companies Act of 1862, it was held that a contract within the object of the company might be made by the directors without seal (31). If a document under seal is necessary, then a mere defect in the manner of affixing the seal will not render the document invalid (32).

The execution of an instrument by or on behalf of the company, where the common seal is not required to be affixed thereto, may be done in the following form: The instrument may begin with the words, "This instrument is made between A. of the one part and—Company, Ltd., of the other part" and end with the testimonium: "As witness the hands of [the aforesaid A (where the instrument is executed by both the parties)], K and M two of the directors (or P, the managing director or R, the managing agent) of the said company, on its behalf, have or has set their (or his) hands" (33).

**302. Where seal is required to be affixed :—**Except in special cases where a seal is required by the provisions of the Act or the company's articles to be affixed to an instrument executed by the company, a contract or other instrument may be executed on behalf of the company without seal in the manner stated in the previous paragraph. The Act provides that a certificate of shares or stock (s. 84), a share-warrant (s. 114), a power of attorney for execution of deeds (s. 48) a power of attorney authorising a person to use its official seal at a place outside India (s. 50) and an instrument of proxy executed by a body corporate [s. 176 (5) (b)] should be under the common seal of the company or the body corporate, as the case may be.

**303. How seals are affixed and by whom :—**A person having power to manage the affairs of a *trading* company has implied power to affix the seal (34), and the right to use the seal of the company for the purposes of its business is usually vested in the directors who under s. 291 can exercise all the powers of the company (35).

Where the articles make special provisions (as in reg. 84 of Table A) as to the affixing of the seal, these provisions must be strictly followed. But if the instrument is, on the face of it, regular, the outsiders who deal with the company have a right to presume that the seal has been duly affixed, that the directors were duly appointed and that their signatures duly made; and the burden of proving the contrary rests on those who allege it (36).

Under the English law, a deed to be effectual must be sealed and *delivered*, but

(31) *South of Ireland Colliery Co. v. Waddle* [1868] 3 C.P. 463.

(32) *Dehra-Dun Mussoorie E. Tramway Co. v. Jagamandar* [1932] A. 111, [1931] A.L.J. 1038, 134 I.C. 244.

(33) See *Palmer's Company Precedents*, 15th ed., Vol. I, p. 306.

(34) *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93.

(35) See also *Barned's Banking Co.* [1867] 3 Ch. App. 105, and *Palmer's Company Precedents*, 15th ed., Vol. I, p. 73.

(36) *Palmer's Company Precedents*, 15th ed., Vol. I, p. 74.

in the case of a corporation, the affixing of the seal imports delivery. Therefore, instead of the words "signed, sealed and delivered in the presence of . . . .", in the case of a company the following words at the end of an instrument are sufficient, namely, "the common seal was affixed in the presence of . . . and . . . .". *Prima facie* if the common seal is duly affixed to a deed it becomes operative (37).

Where reg. 84 of Table A is adopted in, or not excluded from, the articles of a company, the resolution of the directors may be in the following form : "That the seal of the company be affixed to the instrument submitted to this meeting and expressed to be made between A of the one part and the company of the other part in the presence of X and Y, two directors and Z, the secretary of the company who shall sign the instrument."

In such a case the testimonium clause may run thus : "In witness whereof the company has caused its common seal to be hereunto affixed the day and the year first above written. The common seal of the company was affixed to the within written instrument in the presence of—

	X	}	Directors
(Signatures)	Y		
	Z		Secretary."

**304. Attestation** :—Where a mortgage deed is executed on behalf of a company, it is required to be attested by at least two witnesses (s. 59 of the Transfer of Property Act, 1882). In such a case the instrument should be attested by two outsiders, and the signatures of the two directors and the secretary are not sufficient (38).

**305. Contract before incorporation** : A company cannot be bound by any contract made on its behalf before it comes into existence, nor can it, subsequent to its formation, ratify such a contract. But this need not prevent a contracting party under certain circumstances from becoming a trustee for the company in respect of agreement which such party has made for the company's benefit (39). Where the plaintiff who was the promoter and prospective director of a limited company entered into a contract with the defendants to supply goods to them before incorporation of the company and signed the contract as "Leopold (Newborne) Ltd. and the plaintiff's name "Leopold Newborne" was written underneath, it was held that the contract was made not with the plaintiff, whether as agent or principal, but with a non-existent limited company. Therefore it was a nullity, and the plaintiff could not adopt it as his contract (40).

**306. Contracts made by manager** :—A company which has appointed a manager of its business is bound by contracts made by him in the usual course of business, although sufficient powers have not been delegated to him (41). Where goods are supplied to the orders of unauthorized persons, the company is liable if the goods are received and used for the purposes of its trade (see the last case). Where in a suit to enforce a contract entered into by the managing agent, the plaintiff joins both the managing agent and the principal, only one of them can be held liable; but if the agent stands alone as agent for an undisclosed principal both would be liable (42).

(37) *Ibid.*, pp. 74-75.

(38) *Defell v. White* [1866] L.R. 2 C.P. 144 (146).

(39) *Wearne Bros., Ltd. v. Russa Engineering Works* [1928] 7 Rang. 144 (P.C.).

(40) *Newborne v. Sensolid (C.B.) Ltd.* [1953] 1 A.E.R. 708 (C.A.).

(41) *Smith v. Hull Gas Co.* [1852] 11 C.B. 897; see also *Royal British Bank v. Turquand* [1856] 6 E. & B. 327; *Overend, Gurney & Co.* [1869] 4 Ch. App. 460.

(42) *Pattinson v. Bindhya Debi* [1933] P. 196, 12 Pat. 216.

**307. Personal liability** :—Where an agreement to borrow money was not sealed with the seal of the company, nor countersigned by the secretary pursuant to the articles of association, nor did the directors who signed the agreement express that they signed on behalf of the company, it was held that the directors were personally liable to repay the money (43). See notes to the next section.

**308. Tort** :—But as regards tort the position is different. "In a sense, every tort is *ultra vires*, for no corporation is formed for the purpose of committing wrongs but a company is not thereby exempted from liability *ex delicto*. It is liable for torts such as for instance malicious prosecution, libel or fraudulent misrepresentation committed by its agents, although no express command or privity of the company is proved. It may sometimes be liable for the acts of its liquidators" (44).

**309. Power to borrow** :—A trading or commercial company, but not a literary or scientific society, has an implied power to borrow and to mortgage or charge all or any part of its property (45), and the contract need not be under seal (46). Where the chairman of a company as principal officer, while carrying on business of the company, executed a declaration creating a lien on the company's property in respect of a loan sanctioned by the board, but the articles of association were silent as to the authority of the person entering into agreement on behalf of the company, it was held that the chairman had implied authority to execute the declaration (47). Any other company may also borrow, if so authorised by its memorandum (48). If there is no power to borrow, a loan is irrecoverable as a debt, and any security given for the debt is void (49). But where the lender is a company without power to lend and the borrower is a company without power to borrow, the latter by borrowing is a party to a breach of trust, and the money lent is recoverable (50).

An overdraft at a company's bankers is a loan (51).

**310. Ultra vires payment** :—A payment which is *ultra vires* is a breach of trust and the directors or other persons making the payment are liable to make good the money (52).

**311. Where borrowing power is limited** :—Where the borrowing powers of a company are limited, any security given for any amount lent to the company beyond the limit is void, even though the limit is subsequently increased (53). Where the borrowing powers of directors are limited to a certain amount, they cannot borrow beyond that amount, so as to bind the company (53). If however the borrowing is not in excess of the powers of the company, it may be ratified by the company in a general meeting (54) by an ordinary resolution (55).

**312. Ultra vires contracts** :—It may be generally stated that a contract *ultra vires* the company is wholly void and cannot be enforced (56); and a contract not

(43) *McCollin v. Gilpin* [1880] 5 Q.B.D. 390.

(44) Hals. (Hailsh.), p. 432 and the cases collected there.

(45) *Re Badger, Mansell v. Cobham* [1905] 1 Ch. 568.

(46) *South of Ireland Colliery Co. v. Waddle* [1868] L.R. 3 C.P. 463, on appeal 4 C.P. 617; *Lawford v. Billericay & Co. Council* [1903] 1 K.B. 772.

(47) *Indus Film Corpn.* [1939] S. 100.

(48) *Re Badger, Mansell v. Cobham* [1905] 1 Ch. 568.

(49) *Troup's case* [1860] 29 Beav. 353.

(50) *Ernest v. Croysdill* [1860] 2 De G. F. & J. 175; *Moxham v. Grant* [1900] 1 Q.B.

88; *Hardy v. Metropolitan Land Co.* [1872] 7 Ch. App. 427.

(51) *Cunliffe Brooks & Co. v. Blackburn & Co. Society* [1884] 9 App. Cas. 857.

(52) *Re Sharpe* [1892] 1 Ch. 154.

(53) *Fountain v. Carmarthen Ry. Co.* [1868] 5 Eq. 316.

(54) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366 (P.C.).

(55) *Grant v. U. K. S. Rys. Co.* [1888] 40 Ch. D. 135.

(56) *Ashbury Ry. Carriage Co. v. Riche* [1875] 7 H.L. 653; *Attorney General v. Great Eastern Ry. Co.* [1880] 5 App. Cas. 473; *London County Council v. A. G.* [1902] A.C. 165.

*ultra vires* the company, but *ultra vires* the directors, may be ratified by the shareholders (57). But if the company ratifies the contract without knowledge of the fact that it was entered into by the directors *ultra vires*, the company will not be bound by it (58). In England a contract made before the incorporation of a company by some person professing to act on its behalf cannot be ratified by the company after incorporation (59). The Indian law is different (see notes to s. 34). There is nothing however to prevent the company from entering into a new contract to carry into effect the terms of the pre-incorporation contract (60). Mere acting on the old contract does not make it binding on the company (61), not taking benefit under the same (62). A public company cannot make a binding contract until it is entitled to commence business complying with the provisions of s. 149.

**313. Manager's powers :—**If the directors appoint a manager or other official, he may be given authority by some resolution of the board or by an instrument under the company's seal (63). The mere appointment of a manager under a power for that purpose, will only operate as a delegation to such manager of the ordinary commercial business of the company (64).

**314. Contract by agent :—**A person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal without words expressly or by necessary implication showing that he only signs as agent (65). See notes to the next section. Where a contract was within the scope of the business of the company, the contract, though not executed in accordance with the terms of the deed of settlement of the company, was held to have been ratified, if not authorised by the company (66).

After the death of a director of a bank, its accountant sold certain property of the bank on its behalf without having any power of attorney. The transferee was familiar with the character of the bank from its inception : *held* that the sale was not binding on the bank (67).

**314A. Oral contracts:—**Where the contract with the company is of such a nature that it could be made orally between private individuals, the absence of a written agreement does not vitiate the contract (68). Moreover if the execution of such an agreement is not a condition precedent to the coming into force of the rights and obligations of the parties, and it is stipulated that the working of the contract would begin from a particular date the contract is valid (68).

**314B. Construction of contract :—**The construction of a document cannot be controlled by any subsequent declaration or conduct of the parties, *a fortiori* by any

(57) *Grant v. U. K. S. Rys. Co.* [1888] 40 Ch. D. 135.

(58) *District Board Kistna v. Keenem Lakshmayya* [1938] M. 227, [1938] 1 M.L.J. 391.

(59) *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyres Co.* [1902] 1 Ch. 146.

(60) *Natal Land &c. Co. v. Pauline Syndicate* [1904] A.C. 120 (P.C.); *North Sydney &c. Co. v. Higgins* [1899] A.C. 263 (P.C.).

(61) *Howard v. Patent Ivory Co.* [1888] 38 Ch. D. 156; *Natal Land &c. Co. v. Pauline C. Syndicate* (supra).

(62) *Northumberland Avenue Hotel Co.* [1886] 33 Ch. D. 16.

(63) *National Motor Mail Coach Co., Clinton's Claim* [1908] 2 Ch. 515. *overruling* the decision in *English & Colonial Produce Co.* [1906] 2 Ch. 435.

(64) *Beer v. London & Paris Hotel Co.* [1875] 20 Eq. 412; *Land Credit Co.* [1869] 4 Ch. App. 460.

(65) *Cartmell's case* [1874] 9 Ch. App. 691 at p. 696.

(66) *Paice v. Walker* [1870] L.R. 5 Exch. 173.

(67) *Reuter v. Electric Telegraph Co.* [1856] 6 E. & B. 341.

(68) *Anand v. Dinshaw & Co.* [1942] O. 417, [1942] O.W.N. 319, 200 I.C. 485.

(68) *Mahesh Co. v. Oil Mills Ltd.* [1955] N.U.C. 3376 (All.).



of the parties, though where the words are ambiguous, they may be explained by the previous or contemporaneous conduct of the parties (69).

**315. Enforcement of contract :—**"Now of course," said Cotton, L. J., "as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of, or does not perform, the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a Court of Equity, be allowed to insist upon and enforce the contract" (70). There is nothing in the Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others which contain a provision for his benefit. Such third party may be held directly to be entitled under the contract (71).

As to the rights of a party under an executory contract when the other party repudiates it and refuses to perform his part of the contract see *Transport Co. v. Tiruneveli M. B. Service Co.* (1955) N.U.C. 3186 (Mad.).

**316. Where company is undisclosed principal :—**If an agent of a company other than a private company which is not subsidiary of a public company enters into a contract in which the company is the undisclosed principal, he must make a memorandum in writing of the terms of the contract and other particulars and file it in the office of the company, and the memorandum shall be laid before the directors at the next board meeting (72).

**317. Termination of contract :—**There is no ground in law for saying that where a written contract has been made which required a written notice on either side before it could be terminated, it cannot be terminated by word of mouth by mutual agreement between the parties, and it makes no difference if the contract of service is one between a company and its directors (73).

Once the rights of parties dealing with a company have become fixed by a contract, the company cannot by a resolution subsequently passed by it alter those rights (74).

**47. Bills of exchange and promissory notes.—**A bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if drawn, accepted, made, or endorsed in the name of, or on behalf or on account of, the company by any person acting under its authority, express or implied.

This section corresponds to s. 89 of the previous Act and s. 33 of the English Act of 1948.

**318. Power of company to accept bills &c. :—**Whether a company can make, accept, indorse or issue bills of exchange, promissory notes and other negotiable instruments depends on its objects as stated in the memorandum of association. It

(69) *Bank of India v. Rustom Fakirji* [1955] B. 419, 57 Bom. L.R. 850.

(70) *Gandy v. Gandy* [1884] 30 Ch. D. 57 at pp. 66-67.

(71) *Khirod v. Mangobinda* [1933] 38 C.W.N. 682.

(72) S. 416.

(73) *Latchford P. Cinema v. Ennion* [1931] 145 L.T. 672.

(74) *Tanjore Life Assurance Co. v. Kuppana Rau* [1920] 43 Mad. 333; *Conjeeveram Hodgsonpet v. Kandaswamy* [1915] 28 I.C. 847. See also *Bailey v. British Equitable Assurance Co.* [1904] 1 Ch. 374 and *Pearce Lal v. Dewan Singh* [1930] A. 661, [1930] A.L.J. 777.

cannot do any such thing unless it has express or implied power under the memorandum (75). Where the memorandum of association stated that one of the objects of the company was to make promissory notes, and in the articles power was given to the managing agents to make contracts and sign receipts on behalf of the company, it was held that the managing agent was not liable on such notes (76).

**319. Implied power to borrow :—**In the case of a trading company there is an implied power to borrow (77) and accept and issue bills and notes; and there are other commercial concerns which may also have an implied power (78), but a railway company cannot accept or indorse bills of exchange (78).

**319A. Negotiable instruments :—**The fundamental principle underlying the law of negotiable instruments is that as they pass from hand to hand persons dealing with them should have no doubt as to who is liable under them, and although the same principle is enunciated in s. 27 of the Negotiable Instruments Act XXVI of 1881, the present section emphasises that principle and makes it clear that a company will not be bound in respect of a negotiable instrument unless that instrument on the face of it and according to its tenor makes it clear that it is made, drawn or endorsed by the company itself (78a).

There is a sharp distinction between a case where a company is sought to be made liable on a negotiable instrument and a case where a company is seeking to recover money already paid by a bank on cheques drawn upon the bank (78a). In order to protect the bank it is necessary that the bank should act *bona fide* and that the person drawing the cheque and the person honouring it must intend that the cheque was to operate on a certain account. Where these conditions are satisfied the bank is protected although the cheque did not comply with any particular formality (78a).

**320. Company's liability on bills etc. and endorsements :—**The question as to the liability of a company on a particular indorsement on a bill is in every case one of construction. If on the true construction the bill or note is that of the company, it will be liable upon the bill, and not the individuals whose names appear on it. On the other hand if on the true construction the bill or note is not the bill or note of the company, the persons whose names are on it will be liable whether they intended to be so or not (79). It is of the utmost importance that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or back of the document, so that the responsibility is made plain and can be instantly recognized (80). In order to make the company liable on a bill or note it must appear on the face of such bill or note that it was intended to be drawn, accepted or made on behalf of the company (81).

Where the indorsement was "M. & Sons, Managing Agents of L. A. Co. Ltd.", it was held by Sanderson C. J. and Rankin J., that it would not necessarily be clear

- (75) *Peruvian Rys. Co. v. Thames &c. Co.* [1867] 2 Ch. App. 617; *Bateman v. Mid-Wales Ry. Co.* [1866] L.R. I.C.P. 499; see also Byles on Bills 17th ed., p. 84.
- (76) *Jhandu Mal v. Dehra-Dun Mussoorie E. Tramway Co.* [1930] A. 778, 52 All. 883, [1930] A.L.J. 1052, 128 I.C. 758.
- (77) *Bank of Australasia v. Breillat* [1847] 6 Moo. P.C.C. 195.
- (78) *Dickinson v. Valpy* [1829] 10 B. & C. 128; *Steele v. Harmer* [1845] 11 M. & W. 831; *Bateman v. Mid-Wales Ry. Co.* [1886] L.R. I.C.P. 499; see *Bramah v. Roberts* [1837] 3 Bing. N.C. 963.
- (78a) *Bombay Mercantile Bank v. Oriol Industries Ltd.* [1956] B. 57, 57 Bom. L.R. 1039, (1955) Bom. 1072 relying on *Mahony v. East Holyford Mining Co.* [1875] 2 H.L. 869.
- (79) *Sreelal v. Lister Antiseptic Dressing Co.* [1925] 52 Cal. 802, 29 C.W.N. 828, following *Chapman v. Smethurst* [1909] 1 K.B. 927 (C.A.). See also *Jhandu Mal v. Dehra-Dun Mussoorie E. Tramway Co.* [1930] A. 778, 52 All. 883.
- (80) *Sadasukh v. Kissen Pershad* [1918] 46 Cal. 663 (P.C.), 23 C.W.N. 937, 29 C.L.J. 340 (P.C.).
- (81) *New Fleming & Weaving Co.* [1880] 4 Bom. 275.

to any one that the responsibility of L. A. Co. Ltd. was involved, and that L. A. Co. Ltd. was not therefore liable (79). The words "managing director" or "director" may be treated as words of description only (82). In such cases the Court is entitled to look at the surrounding circumstances under which the bill is signed (82). "We the directors of X, Y. & Co. do promise to pay" &c. signed by the directors will make them personally liable (83). A promissory note ran as follows : "We promise to pay . . . or order the sum of . . . value received" and it was signed by two directors and below the signatures were given their description as directors. Below these signatures were the signature of the managing agents and the promissory note also bore the seal of the company : *held* that the note did not bind the company (84).

Where the managing agent of a company, who is authorised to borrow money for the company, borrows money by executing a promissory note in his name alone, and not on behalf of the company, the latter cannot be held liable having regard to the provisions of this section. The facts that the money was borrowed for the company, that the company benefited by it and the creditor knew for what purpose the money was being borrowed, are not by themselves sufficient to bind the company, as the note was not executed by or on behalf of the company (85).

A bill of exchange directed to a company was accepted thus : "Accepted payable at . . . C.M. directors of" the company, such acceptance being countersigned by the secretary. The directors were in fact authorized to accept bills. In an action against C. & M. personally, it was held that the acceptance bound the company (86). Where one of the secretaries, treasurers and agents of a company signed a promissory note in his own name, but it was written on a form of letter of the company and bore a rubber stamp impression of the company, it was held that the note was signed on behalf of the company who purchased and used the machinery for which the promissory note was given (87).

The defendant bank negligently and contrary to instructions paid cheques of their customers, the plaintiff company, which had been signed by one director only. The cheques were drawn in favour of the trade creditors of the company. In an action by the company for money had and received it was held that as the liabilities of the company had not increased by reason of the payment of the cheques, the defendants were protected from liability on equitable grounds, and were entitled to stand in the shoes of the creditors whom they had paid (88).

If the directors of a company, which has no power to accept bills, purport to accept them on behalf of the company, they will be personally liable (89).

**321. Indorsement "per pro" :**—Where an agent accepts or indorses '*per pro*', the taker of the bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority. Where the agent has such authority his abuse of it does not affect a *bona fide* purchaser for value (90).

**322. Personal liability of agents :** If the company is liable on a bill, its authorized agents are not personally liable, although using words apparently sufficient for that purpose, such as 'I promise' or 'we promise' (91), provided that

(82) *Elliot v. Bax-Ironside* [1925] 2 K.B. 301.

(83) *Dutton v. Marsh* [1871] 6 Q.B. 361, 24 L.T. 470.

(84) *Jajodia Cotton Mills* [1927] C. 612, 31 C.W.N. 683.

(85) *Mangal Bahu v. Jaitley & Co.* [1946] A.L.W. 70, [1946] O.W.N. (H.C.) 70, 223 L.C. 311.

(86) *Okell v. Charles* [1876] 34 L.T. 822.

(87) *Poona Chitrashala &c. Co.* [1923] B. 29, 24 Bom. L.R. 355, 67 I.C. 941.

(88) *B. Liggett (Liverpool) Ltd. v. Barclays Bank* [1928] 1 K.B. 48.

(89) *West London Commercial Bank v. Kitson* [1884] 13 Q.B.D. 360.

(90) *Bryant v. La Banque du Peuple* [1893] A.C. 170.

(91) *Chapman v. Smethurst* (supra).

the signatures are expressed to be on behalf of a principal or in a representative capacity (92). Words describing them as being officers of the company may not themselves exempt them from the liability (93); but where the name of the signatory appears as a director, or managing director, he is not personally liable (91). Directors are however personally liable on a bill which does not state the name of the company correctly (94).

Where the chairman of a co-operative society did not exclude his personal liability by signing on behalf of or on account of the society, he was held personally liable, although he described himself as chairman (95).

**323. Managing director's power** :—If the managing director could have been authorized under the articles to draw and accept a bill of exchange, a holder in due course is entitled to assume that he had authority and the holder is not bound to inquire into the internal management of the company or to prove an actual authority (96).

**324. Manager's power** :—The manager of a bank has authority to make a valid transfer of a negotiable instrument on behalf of the bank (97).

**325. Power of delegation** :—In a suit by the holders of a bill of exchange in due course it was held following *Houghton & Co. v. Nothard, Lowe & Wills* (98) that as it did not appear that the plaintiff knew of the existence of the power of delegation contained in the defendant's articles of association, they were not entitled to rely upon its supposed exercise (99). It was further held that the bills of exchange were forgeries and, therefore, applying *Ruben v. Great Fingall Consolidated* (1), it was held that the plaintiffs could not in any event invoke the principle that they would not be bound to enquire into the indoor management of the defendant company (99).

As to the mode in which authority to accept bills may be given, see *Overend, Gurney & Co.* (2).

Where a resolution of the directors required bills of exchange to be signed by a director and the secretary, it was held that a bill signed by a director only was not binding on the company, even in the hands of a holder who did not know of the resolution (3).

**326. Party to suit** :—Where a promissory note, executed in favour of a bank which went into liquidation, was indorsed in favour of another bank, the latter in a suit on the promissory note might properly ask for permission to make the bank in liquidation a party to the suit (4).

See notes to the previous section.

(92) *Alexander v. Sizer* [1869] 1 R. 1 Exch. 102.

(93) *Courtauld v. Saunders* [1869] 16 L. T. 562 (C.A.).

(94) *Atkins & Co. v. Wardle* [1889] 61 L.T. 23, on appeal 5 F.L.R. 734; *Nassau Steam Press v. Tyler* [1891] 70 L.T. 376.

(95) *Damodar v. Ramnath* [1932] 34 Bom. L.R. 1327.

(96) *Dev v. Pullinger Engineering Co.* [1921] 1 K.B. 77 [*Premier Industrial Bank v. Carlton Mfg. Co.* (1909) 1 K.B. 106 not followed]. But see *Houghton & Co. v. Nothard, Lowe & Wills* [1927] 1 K.B. 246 (C.A.).

(97) *Hindustan Assurance Society v. Gurdit Singh* [1924] L. 462, 6 L.L.J. 183, 80 L.C. 741.

(98) [1927] 1 K.B. 246 (C.A.).

(99) *Kreditbank Cassel & Co. v. Schenkers Ltd.* [1927] 1 K.B. 826 (C.A.).

(1) [1906] A.C. 439.

(2) [1869] 4 Ch. App. 460.

(3) *Premier Industrial Bank v. Carlton Manufacturing Co.* [1909] 1 K.B. 106.

(4) *Punjab Co-operative Bank v. Lyallpur Bank* [1931] L. 328, 150 I.C. 670.

**48. Execution of deeds.**—(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in or outside India.

(2) A deed signed by such an attorney on behalf of the company and under his seal where sealing is required, shall bind the company and have the same effect as if it were under its common seal.

This section corresponds to s. 90 of the previous Act and s. 34 of the English Act of 1948.

**Scope** :—Under this section a company can, by a power of attorney executed under its common seal, empower the attorney to execute deeds on its behalf either in or outside India or Pakistan, as the case may be, and where sealing is required the attorney is empowered to use his own seal for the purpose.

As to the use of the common seal, see notes to ss. 46, 48, 84, 114 and reg. 84 of Table A.

**49. Investments of company to be held in its own name.**—(1) Save as otherwise provided in sub-sections (2) to (5) and subject to the provisions of sub-sections (6) to (8),—

(a) all investments made by a company on its own behalf shall be made and held by it in its own name; and

(b) where any such investments are not so held at the commencement of this Act the company shall, within a period of one year from such commencement, either cause them to be transferred to, and hold them in, its own name, or dispose of them.

(2) Where the company has a right to appoint any person or persons, or where any nominee or nominees of the company has or have been appointed, as a director or directors of any other body corporate, shares in such other body corporate to an amount not exceeding the nominal value of the qualification shares which are required to be held by a director thereof, may be registered or held by such company jointly in the names of itself and of each such person or nominee or in the name of each such person or nominee expressly described as a nominee of the company.

(3) A company may hold any shares in its subsidiary in the name or names of any nominee or nominees of the company, if and in so far as it is necessary so to do, to ensure

that the number of members of the subsidiary is not reduced, where it is a public company, below seven, and where it is a private company, below two.

(4) Sub-section (1) shall not apply to investments made by a company whose principal business consists of the buying and selling of shares or securities.

(5) Nothing in this section shall be deemed to prevent a company—

(a) from depositing with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or

(b) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it.

(6) The certificate or letter of allotment relating to the shares or securities in which investments have been made by a company shall, except in the cases referred to in sub-sections (4) and (5), be in the custody of such company or with a Scheduled Bank, being the bankers of the company.

(7) Where, in pursuance of sub-sections (2), (3), (4) or (5), any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall forthwith enter in a register maintained by it for the purpose—

(a) the nature, value, and such other particulars as may be necessary fully to identify the shares or securities in question; and

(b) the bank or person in whose name or custody the shares or securities are held.

(8) The register kept under sub-section (7) shall be open to the inspection of any member or debenture holder of the company without charge, during business hours, subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so that not less than two hours in each day are allowed for inspection.

(9) If default is made in complying with any of the requirements of sub-sections (1) to (8), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(10) If any inspection required under sub-section (8) is refused, the Court may, by order, direct an immediate inspection of the register.

Nothing in this sub-section shall be construed as prejudicing in any way the operation of sub-section (9).

(11) In this section, "securities" includes stock and debentures.

This section is new and "is based on the Company Law Committee's recommendation at page 296 (?) of its Report"—*Notes on Clauses*.

This was originally cl. 44 of the Bill which has been recast by the Joint Committee with the following observations:—"The Committee consider that this clause which requires a company to hold all investments in its own name should not apply to an investment company whose business consists of the buying and selling of shares, stock, debentures or other securities. Deposits of securities in a bank for the collection of dividend or interest and deposits or transfers by way of security are permitted. In the case of investments held by a company at the commencement of this Bill, the period of six months allowed by the Bill as introduced for compliance with the provisions of this clause has been increased to one year. The Committee have also provided for the keeping of a register of all securities belonging to, but not held by, a company in its own name" (*vide* J.C.R., para 24).

**50. Power for company to have official seal for use outside India.**—(1) A company whose objects require or comprise the transaction of business outside India may, if authorised by its articles, have for use in any territory, district or place not situate in India an official seal which shall be a *facsimile* of the common seal of the company, with the addition on its face of the name of the territory, district or place where it is to be used.

(2) A company having an official seal for use in any such territory, district or place may, by writing under its common seal, authorise any person appointed for the purpose in that territory, district or place to affix the official seal to any deed or other document to which the company is a party in that territory, district or place.

(3) The authority of any agent authorised under sub-section (2) shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, certify on the deed or other document

to which the seal is affixed, the date on which and the place at which, it is affixed.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

This section is based on s. 91 of the previous Act and s. 35 of the English Act of 1948—*Notes on Clauses*.

As to the use of the common seal, see ss. 46, 48, 84 and 114 and reg. 84 of Table A, and notes thereto.

### *Service of Documents*

**51. Service of documents on company.**—A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office.

Ss. 51 and 52 are based on ss. 148 and 149 of the previous Act—*Notes on Clauses*. Vervel changes in this section have been made by the Joint Committee.

In the heading (top) for "*Notices etc.*" the word "*Documents*" has been substituted by the Lok Sabha. The word "*officer*" has been added in the section (*ibid*).

**327. Service of documents etc.**—A notice or order of Court, if served on the directors at the registered office of the company is good service, provided that it is addressed to the company and not to the directors (5).

It has been held in England that a postal service on a company under the corresponding section [s. 437 (1)] may be effected by either ordinary or registered letter (6). Q. & Co. Ltd. was the registered owner of a motor car which was involved in a road accident. The police sent a notice of intended prosecution by registered post to Q. & Co. at the company's registered address instead of Q. & Co. Ltd. The notice was received and accepted by the company; held that notwithstanding the omission of the word "Limited" from the company's name in the notice, the notice was valid (7).

**328. Summons how served:** A summons to appear before a Magistrate can be served in the way provided in this section (8). A foreign corporation carrying on business in England (9), even for a short time, is liable to be sued in an English Court and may be served in the same manner as an English company (10).

**52. Service of documents on Registrar.**—A document may be served on a Registrar by sending it to him at his office by post under a certificate of posting or by registered post, or by delivering it to or leaving it for him at his office.

See notes to s. 51.

(5) *Benabo v. William Jay & Partners, Ltd.* [1941] 1 Ch. 52.

(6) *T. O. Supplies (London) Ltd. v. Jerry Creighton, Ltd.* [1951] 2 A.F.R. 992.

(7) *Springate v. Questier* [1952] 2 A.F.R. 21.

(8) *Pearks, Gunston & Tee v. Richardson* [1902] 1 K.B. 91.

(9) As to what amounts to carrying on business in England see cases cited in Buckley, 10th ed. p. 276 note (i).

(10) Buckley, 10th ed. p. 276 & cases cited there; *Naamloose &c. Wokar* [1946] 1 Ch. 98, 174 L.T. 101.



**53. Service of documents on members by company.—**

(1) A document may be served by a company on any member thereof either personally, or by sending it by post to him to his registered address, or if he has no registered address in India, to the address, if any, within India supplied by him to the company for the giving of notices to him.

(2) Where a document is sent by post,—

(a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member ; and

(b) unless the contrary is proved, such service shall be deemed to have been effected—

(i) in the case of a notice of a meeting, at the expiration of forty-eight hours after the letter containing the same is posted, and

(ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.

(3) A document advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly served on the day on which the advertisement appears, on every member of the company who has no registered address in India and has not supplied to the company an address within India for the giving of notices to him.

(4) A document may be served by the company on the joint-holders of a share by serving it on the joint-holder named first in the register in respect of the share.

(5) A document may be served by the company on the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India

supplied for the purpose by the persons claiming to be so entitled, or until such an address has been so supplied, by serving the document in any manner in which it might have been served if the death or insolvency had not occurred.

This section is based on regulations 112 to 115 of Table A in the First Schedule to the previous Act, which were all compulsory regulations [see s. 17 (2) of the old Act]. They have therefore been incorporated into the body of the Act as suggested by the C.L.C.—*Notes on Clauses*. Sub-s. (3) has been recast by the Joint Committee.

In this section the word "document" has been substituted for the word "notices" at several places, and in sub-s. (2) (a) the words after "containing the" have been added by the Lok Sabha.

**329. Notice in the case of a deceased member:**—Where under the articles 'notice of a general meeting was to be given to "members" and such notice might be served upon any "member" either personally or by sending it prepaid by post addressed to "such member" at his registered address, it was not necessary, in the case of a deceased member, either to send a notice addressed to him at his registered address or to serve his legal representative, unless they had themselves become "members" by formal registration (11).

Where the company through its officers has actual knowledge of the death of a shareholder, it cannot however rely upon a notice addressed to the deceased member for basing upon it a resolution forfeiting unclaimed dividend; for such resolution must be *strictissima juris* (12). But if the company has no knowledge of his death, a notice served on him in the manner prescribed is effective (13).

**330. Notice sent by post:**—For ordinary purposes a notice sent by post will be deemed to have been served (14), even if in fact it never reached the addressee. But making over a letter to a postman outside the pillar box is not posting (15). The regulation however does not apply so as to affect the member with notice of a misrepresentation (which notice was in fact given by the document), if the document does not reach his hands (16).

**331. Date of service:**—Provisions in the articles regulating the date on which a notice is deemed to be served was to be considered; but an article, which provided that the day of service of a notice was to be counted in the relevant number of days must be disregarded (17).

**332. Substituted service:**—An article like this does not validate an order for substituted service of legal proceedings on a member, if the registered address is not in fact his residence or place of business (18).

**333. Presumption:**—The words "unless the contrary is proved" in sub-s. (2), cl. (b) made the presumption a rebuttable one (19).

(11) *Allen v. Gold Reefs of West Africa* [1900] Ch. 656, 670; *Tricumdas Mills Co. v. Haji Saboo* [1902] 4 Bom. L.R. 215.

(12) *Ward v. Dublin & Co. Co.* [1919] 1 I.R. 5.

(13) *James v. Buena Ventura Syndicate* [1896] 1 Ch. 456; *New Zealand Gold Co. v. Peacock* [1894] 1 Q.B. 622.

(14) *Ramdas v. Cotton Ginning Co.* [1887] 9 All. 366.

(15) *London & Northern Bank* [1900] 1 Ch. 220.

(16) *London & Staffordshire Fire Insurance Co.* [1883] 24 Ch. D. 149.

(17) *Hector Whaling Ltd.* [1936] 1 Ch. 208, 154 L.T. 342.

(18) *Ex. p. Chatteris* [1875] 10 Ch. App. 227.

(19) *King v. Westminster Unions* [1917] 1 K.B. 832.

**333A. Notice by advertisement :—**A notice given by advertisement will be deemed to have been given at the time of the publication of the advertisement (20).

### *Authentication of Documents and Proceedings*

**54. Authentication of documents and proceedings.—**Save as otherwise expressly provided in this Act, a document or proceeding requiring authentication by a company may be signed by a director, the managing agent, the secretaries and treasurers, the manager, the secretary or other authorised officer of the company, and need not be under its common seal.

This section is based on s. 150 of the previous Act and s. 36 of the English Act of 1948—*Notes on Clauses*. The words "the secretaries and treasurers" have been inserted by the Joint Committee.

In the headings the words "*and proceedings*" have been added by the Lok Sabha.

## PART III

### PROSPECTUS AND ALLOTMENT, AND OTHER MATTERS RELATING TO ISSUE OF SHARES OR DEBENTURES

#### *Prospectus*

It is considered desirable to put the provisions relating to prospectuses, allotment of shares, and the issue of shares at a commission or discount etc. in a separate Part. The place assigned to these provisions in the Act corresponds to the place which has been assigned to them in the English Act. The provisions relating to prospectuses and allotment are mostly based on the drafts suggested by the Company Law Committee at pages 375 to 389 of the Report. These in their turn are largely modelled on the provisions of the English Act (sections 37 to 52)—*Notes on Clauses*.

**55. Dating of prospectus.—**A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

This section is based on s. 92 of the C. L. C.'s draft and s. 37 of the English Act of 1948—*Notes on Clauses*.

**334. "Prospectus" :—**For the definition of "prospectus" in every part of this section the Court must go back to s. 2, sub-s. (1), cl. (14) of the old Act. To hold that a prospectus was a prospectus only if it conformed to the terms of s. 93 of the old Act would mean that in regard to s. 92 thereof the penalty for failure to file the prospectus could be avoided by allowing it to lack any of the requisites laid down by s. 93 (21).

(20) *Mercantile Investment Co. v. International Co. of Mexico*. [1893] 1 Ch. 484 n., 488 n.

(21) *Shunmugam v. Ranga Rama* [1934] M 641, 67 M.L.J. 437, 152 I.C. 703.

**335. How far contract:**—Ordinarily the prospectus is not relevant in any matter touching the contract between the shareholders and the company. It is not the contract, but only a matter which induces the contract. It would be relevant in an action for rescission based on misrepresentation or fraud, or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment of shares and in the articles. But where the application stipulates that the shares are to be subject to certain special conditions found in the prospectus, that portion of the prospectus must be read into the contract (22).

**336. Meaning of "issuing to the public":**—A circular placed in the hands of friends of the proposed directors, even to the number of forty and intended to be shown to their friends, has been held to be not an invitation to the public (23). It has also been held that printing of 200 copies of a prospectus and circulation thereof by the directors and promoters among their friends is not such an invitation (24). It has however been held that an offer to a limited class may be an offer to the public (25). A proof prospectus circulated before incorporation may not amount to an issue of the prospectus (26).

In this connection the observations of their Lordships in *Nash v. Lynde* (27) are interesting: "In my judgment it is sufficient in order to bring s. 81 (of English Act of 1908 corresponding to s. 93 of the previous Indian Act) into operation that the prospectus in question should be proved to have been shown to any person as a member of the public and as an invitation to that person to take some of the shares referred to in the prospectus on the terms therein set out" (28).

Lord Sumner however observed: "Though literally it is true that the issue is not expressly said in the section to be an issue to the public, I think that it must be so in substance, otherwise any private letter, written by a person engaged in forming a company and advising his correspondent to take shares, would become an issued prospectus if other letters were issued by him asking others to do the same" (29). Then again: "The point is that the offer is such as to be open to any one who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the company or not" (29). "In the present case", observed Lord Sumner, "all that constituted the 'issue' was that one of the directors, in the course of a general endeavour to find money, was furnished with some copies of these type-written documents, and gave one of them to a friend who, as requested, passed it on to a friend of his own. I cannot believe that any one in business would call this the issue of a prospectus" (30).

Lord Buckmaster made the following observations on the point. "The first thing necessary to notice is that s. 81 (of the English Act of 1908 corresponding to s. 93 of the previous Indian Act) contains no reference of any issue to the public. It is sufficient that the prospectus should be issued. The question of what does or does not amount to an issue is a question of fact in each case and is not capable of a rigid and exact definition; but in my opinion it certainly does not necessarily involve a general application impartially made to all members of the public. A distribution of a prospectus among a well defined class of the public would be an issue within the meaning of s. 81" (31).

(22) *Hindusthan C. Insurance Society v. Nathuvinayak* [1946] N.L.J. 128.

(23) *Sleigh v. Glasgow & Transvaal Options* [1904] Ct. of Sess. 6 Fraser 420.

(24) *Sherwell v. Combined I. M. Syndicate* [1907] W.N. 110, 23 T.L.R. 482.

(25) *South of England Natural Gas Co.* [1911] 1 Ch. 573.

(26) *Baty v. Keswick* [1901] W.N. 167, 85 L.T. 18.

(27) [1929] A.C. 158.

(28) Per Lord Hailsham L. C. in *Nash v. Lynde* [1929] A.C. 158 at pp. 164-65.

(29) *Ibid.*, per Lord Sumner at p. 169.

(30) *Ibid.*, per Lord Sumner at p. 168.

(31) *Nash v. Lynde* [1929] A.C. 158 at p. 170.

Then again: "A prospectus, the distribution of which was so limited, would none the less be issued and this is the meaning of the statute is, I think, made plain by considering that sub-s. (7) of s. 81 [sub-s. (3) of s. 93 of the previous Indian Act]) excludes from the application of the section a circular inviting existing members of a company to subscribe for shares. This would be unnecessary if an issue to such limited class were not *prima facie* included. The definition gives rise to greater difficulty. A document is not prospectus unless it is an invitation to the public, but if it satisfied this condition it is not the less a prospectus because it is issued to a defined class of the public" (32).

In the case of a reconstruction, shares issued to the members of the old company are not in the same position as shares issued to the public. The circular offering them would appear not to be a prospectus within the meaning of this section (33).

"*Invitation to the public*":—For meaning of this expression see s. 67 *post*.

**337. Prospectus when false** :—In a prospectus no mis statement or concealment of any material fact or circumstance is allowed (34). A prospectus may be false in "material particulars" within the meaning of s. 8 of the English Larceny Act, 1861, if by a number of statements a false impression with regard to the financial position of a company is intentionally conveyed, although each statement taken by itself is true (35).

Where a prospectus described a contract for the construction of a railway line as entered into it at "a price considerably within the available capital of the company" and the facts were that from the nominal capital of £500,000 was to be deducted £50,000 as the price of purchasing the concession to make the railway and the contract price for making it was £420,000, the representation was held to be untrue and deceptive (36). The phrase "available capital of the company" was not a true but a deceptive description of capital which might be raised under the borrowing powers conferred on the directors (36).

Where no shares were allotted on the faith of the first prospectus, the directors were not bound by the statements contained therein (37).

**338. Remedies of allottees** :—In respect of the liability incurred by a person for issuing a prospectus, the remedies open to an allottee of shares are : (1) rescission of the contract ; (2) defence of misrepresentation or fraud in an action for call ; (3) rectification of the register of members and consequential relief ; (4) damages in an action of deceit ; (5) damages under the statutory provisions and (6) criminal proceedings.

**339. Effect of fraud and misrepresentation** :—A person who has been misled by misrepresentation and whose shares have been forfeited for non-payment of calls, ceases to be a shareholder. As a debtor to the company he stands on a different footing and may repudiate the contract and defend an action for calls on the ground of fraud (38). When a material omission in the prospectus rendered the prospectus fraudulent under the statute, it was held that the shareholder had his remedy against the person making the omission, but could not have his name removed from the register of shareholders (39).

(32) *Ibid* at p. 171.

(33) See *Booth v. New Afrikander C. M. Co.* [1903] 1 Ch. 295.

(34) *Eaglesfield v. Londonderry* [1876] 4 Ch. D. 693 (C.A.), on appeal [1878] 38 L.T. 303.

(35) *Rex v. Lord Kylsant* [1932] 1 K.B. 442 [Lord Halsbury's observations in *Aaron's Reefs v. Twiss* (1896) A.C. 273 at p. 281 were relied on].

(36) *Central Ry. Co. of Venezuela v. Kisch* [1867] L.R. 2 H.L. 99.

(37) *A. M. Wood's Ship's Woodite Protection Co.* [1890] 62 L.T. 760.

(38) *Aaron's Reefs v. Twiss* [1896] A.C. 273.

(39) *Gover's case* [1875] 1 Ch. D. 182.

**340. Rescission of contract to take shares :—**The contract to take shares may be rescinded on the ground of misrepresentation made by the company's directors or agents acting within the scope of their authority (40), but not by unauthorized persons making promises purporting to be made on its behalf (41). For examples of misrepresentation and non-disclosure entitling a shareholder to rescission see the cases noted below (42).

If the managing director and other directors commit any breach of rules, the shareholders may have other remedies against them, but not that of rescinding the contract of purchase of shares. They might have acted dishonestly or inefficiently and filed false declarations before the Registrar, but even that would not entitle the shareholders to rescind their contract (43). So long as the contract of purchase of shares from the company is not rescinded, the liability on the shareholder to pay their price remains (43).

After resolutions had been passed for the voluntary winding up, a shareholder in ignorance thereof commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares on the ground of misrepresentation in the prospectus, and to obtain repayment of all moneys already paid and an indemnity against future liability in respect of his shares : held that the relief asked for was not inconsistent with the winding up (44). But a person who before registration of a company applies for shares on the faith of a prospectus, ought to be treated as having become aware of any variation between the prospectus and the memorandum of association at the earliest practicable time (45).

**341. Defence to action for rescission :—**Where there is a material misrepresentation, it is no defence to an action for rescission of the contract that the person to whom the representation was made had the means of discovering, and might with reasonable diligence have discovered, that it was untrue (46). It is no defence to such an action that the person made a cursory and incomplete inquiry into the facts, for if a material misrepresentation is made to him, he must be taken to have entered into the contract on the faith of it, and in order to take away his right to have the contract rescinded, it must be shown either that he had knowledge of facts which showed it to be untrue, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation (46).

**342. Forfeiture after rescission :—**After proceedings for rescission have commenced, forfeiture of the shares for non-payment of calls will be restrained until trial, on the plaintiff giving an undertaking as to damages and paying the amount of calls with interest into the Court (47).

(40) *Adam v. New Biggin* [1888] 13 App. Cas. 308.

(41) *U. K. Shipowners' Co.* [1865] 11 L.T. 613 (C.A.); *Newlands v. National F. A. Assn.* [1885] 51 L.J. (Q.B.) 428 (C.A.).

(42) *Central Ry. Co. of Venezuela v. Kisch* [1867] L.R. 2 H.L. 99; *Ross v. Estates Investment Co.* [1868] 3 Ch. App. 682; *Kent v. Frechold Land Co.* [1868] 3 Ch. App. 493; *Henderson v. Lacon* [1867] L.R. 5 Eq. 249; *Arnison v. Smith* [1889] 41 Ch. D. 372; *Reese River & C. Co. v. Smith* [1869] L.R. 4 H.L. 64; *London & Leeds Bank* [1887] 56 L.T. 115; *London & Staffordshire & C. Co.* [1883] 24 Ch. D. 149; *Blake's case* [1865] 34 Beav. 639; *Wainwright's case* [1890] 63 L.T. 429; *Glascir v. Rolls* [1889] 42 Ch. D. 436; *Mount Morgan (West) Gold Mine* [1887] 56 L.T. 622; *Scott v. Snyder & C. Co.* [1892] 67 L.T. 104; *Lodwick v. Perth* [1884] 1 T.L.R. 76.

(43) *Shiromani Sugar Mills v. Debi Prasad* [1950] A. 508.

(44) *Hall v. Old T. L. Mining Co.* [1876] 3 Ch. D. 749.

(45) *Peel's case* [1867] 2 Ch. App. 674.

(46) *Redgrave v. Hurd* [1881] 20 Ch. D. 1, (C.A.); *Central Ry. Co. of Venezuela v. Kisch* [1867] L.R. 2 H.L. 99.

(47) *Lamb v. Sambas & C. Co.* [1908] 1 Ch. 845.

**343. Claim for rescission and damages :—**A person may combine in the same action his claim for rescission and damages for deceit or compensation under the Act against the directors and other persons (48). Where a prospectus contains a false representation as to a matter of fact made in order to induce a person to act thereon, and acting on such representation he sustains damage, it may be recovered from the directors or promoters who authorized the issue of the prospectus (49). The false statement must be as to matter of fact and not of law (50). But a statement as to something expected to happen in the future is generally a matter of opinion (50). The plaintiff must prove that the defendant was responsible for the prospectus (51). If the false statement is made in the honest belief that it is true it is not fraudulent and does not give ground for an action of deceit (52); but see s. 62 and notes.

**344. Damages :—**A shareholder cannot retain his shares and bring an action for damages against the company (53). He must show that he has repudiated the shares and has not acted as a shareholder after discovering the misrepresentation (54). The right of rescission is lost by delay in repudiating the shares within a reasonable time, as well as by the commencement of winding up (55).

**345. Measure of damages :—**The plaintiff must prove actual damage to himself (56) and the measure of damages is the difference between what the shareholder paid for the shares and what they were worth when the shares were allotted to him (57).

The right of action for deceit survives to the personal representatives of the aggrieved person (58). The compensation should be estimated with reference to the loss sustained and does not resemble a penalty (59).

**346. Director's liability :—**A director is not liable in respect of false representation in a prospectus issued by his co-directors or any other agent of the company unless he has expressly authorized or tacitly permitted its issue, nor is a promoter liable if the misrepresentation is not made with his consent or by his agent (60).

Where a prospectus fulfilling all requirements of law was filed with the register, but subsequently a prospectus was issued in Bengali which did not contain certain particulars required by s. 93 of the previous Act and was not a verbatim translation of the English prospectus filed with the Registrar, it was held that the person issuing the Bengali prospectus was liable to be convicted under sub-section (5) of s. 92 of the previous Act (61).

## 56. Matters to be stated and reports to be set out in prospectus.—(1) Every prospectus issued—

- (a) by or on behalf of a company, or
- (b) by or on behalf of any person who is or has been engaged or interested in the formation of a company,

(48) *Frankenburgh v. Great Horseless Carriage Co.* [1900] 1 Q.B. 504 (C.A.).

(49) *Arnson v. Smith* [1889] 41 Ch. D. 348 (C.A.).

(50) *Beattie v. Ebury* [1872] 7 Ch. App. 777, on appeal [1874] 1 R. 7 H.L. 102.

(51) *Watts v. Atkinson* [1892] 8 T.L.R. 235 (C.A.).

(52) *Derry v. Peck* [1889] 14 App. Cas. 337.

(53) *Houldsworth v. City of Glasgow Bank* [1880] 5 App. Cas. 317.

(54) *Bwlch y-Plwm Lead Mining Co. v. Baynes* [1867] 2 Exch. 324.

(55) *Overend, Gurney & Co.* [1867] 2 H.L. 325 *sub nom.* *Oakes v. Turquand*.

(56) *Hyde v. Bulmer* [1868] 18 L.T. 293.

(57) *Arkwright v. Newbold* [1881] 17 Ch. D. 301 (C.A.); *Stevens v. Hoare* [1904] 20 T.L.R. 407.

(58) *Twycross v. Grant* [1878] 4 C.P.D. 40 (C.A.).

(59) *Thomson v. Clanmorris* [1900] 1 Ch. 718 (C.A.).

(60) *Keighley, Maxted & Co. v. Durant* [1901] A.C. 240.

(61) *Emperor v. Bengal Salt Co.* [1936] C. 33, 40 C.W.N. 320, 37 Cr. L.J. 379.

shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule ; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any of the requirements of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(3) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a prospectus which complies with the requirements of this section :

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

(a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be punishable with fine which may extend to five thousand rupees.

(4) A director or other person responsible for the prospectus shall not incur any liability by reason of any non-compliance with, or contravention of, any of the requirements of this section, if—

(a) as regards any matter not disclosed, he proves that he had no knowledge thereof ; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part ; or

(c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial, or was otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused :

Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of



Schedule II, unless it is proved that he had knowledge of the matters not disclosed.

(5) This section shall not apply—

(a) to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons ; or

(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange ;

but, subject as aforesaid, this section shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

(6) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or under this Act apart from this section.

This section is based upon s. 93 of the C. L. C.'s redraft and s. 38 of the English Act of 1948—*Notes on Clauses*.

**347. Prospectus not to be misleading** :—It is very important to remember that a prospectus should never be misleading. It should reveal the facts in their true colour, as men put their money in the company on the faith of its prospectus. Where a prospectus was issued which purported to invite persons to become shareholders in an old established business, but money was really being asked to feed and supply an ambitious gamble, it was held that the prospectus was false in material particulars. "To advertise that business," observed Lord Hewart C. J., "as a normal business seeking development when money is really being asked to feed and supply an ambitious gamble, is merely deceit. The argument is not that in this or that particular this prospectus is true ; the argument is that its whole purpose and effect were to deceive" (62). For the penalty for issuing a false prospectus see s. 628.

**348. Meaning of "address"** :—Address generally means residence ; is is not sufficient to state the place of business (63).

**349. "Founders' or management shares"** :—Founders' shares are generally few in number and of small nominal value. They are generally created for and appropriated to the remuneration of the founders or promoters of the company, they undertaking to pay the preliminary expenses and guarantee the placing of the shares which are offered for public subscription (64). Founders' shares are usually given a right to a share, say one-third of the surplus profits of the company, after paying a fixed dividend (say, seven per cent. per annum) on the other shares ; and the reason

(62) *R. v. Bishirgian* [1936] 154 L.T. 499 C.A. at p. 502.

(63) *Story v. Rees* [1890] 24 Q.B.D. 748.

(64) *Palmer's Company Precedents*, 15th ed. (1938), p. 533

why the founders' shares attain such high prices in some cases, is that such share of surplus profits, though not very large in itself, may, when spread over a few founders' shares, amount to a very large percentage (65). The founders' or management shares are ordinarily deferred shares receiving no dividend until the preference and ordinary shares have been paid a fair dividend, the amount varying according to agreement. These shares are generally used to remunerate the promoters or founders of the company or the underwriters of the share capital. They are few in number and when surplus profits are large, these shares become very valuable (66). In the case, noted below (67), there was only one management share in respect of which no dividend was payable, but it gave the holder thereof a majority of one over all other votes which could on any poll be cast by all other shareholders present in person or by proxy, so that the holder of the share had complete control of the voting power. The management share also conferred a right on a return of capital in a winding up to one-half of any surplus assets remaining after making provision for the claims of the preference shareholders. At a later date the management share was renamed reversionary share and its voting rights altered so that upon a poll on any special or extraordinary resolution (except a resolution for removing an elected director) the holder should have such a number of votes as should (together with any other votes exercisable by him) exceed by one-third the total votes which could be cast by all the other shareholders present in person or by proxy.

It is not lawful to exchange the founders' (68) or deferred shares for a larger amount of ordinary shares, as this may be in the nature of issuing the ordinary shares at a discount (69). Where additional shares are issued at a premium (70), the founders often claim the premium to be profit and demand their proportionate share, for it appears that the premium may be regarded as profit and may be applied in paying dividend (71). But see now s. 78.

It is to be noted that the present Act prohibits the issue of shares with disproportionate rights. See ss. 88 and 89 *post*.

**350. Remuneration of directors :—**If the remuneration of directors is provided for in the articles, it cannot be changed without a special resolution (72). If the articles provide for the remuneration, it may be paid out of capital, in case there is no profit (73). Directors however may waive their remuneration, and if they do so, they cannot claim it again (74). Directors cannot get their travelling expenses, unless this is expressly provided for in the articles (75). For fuller notes see those under s. 252 and reg. 65 of Table A.

**351. What is sufficient statement :—**Under the old Act when the amount of the minimum subscription stated in the prospectus and the memorandum or the articles of association had been subscribed within one hundred and eighty days after the first issue of the prospectus, and the sum payable on application had been paid and received in cash or by cheque, the company might proceed to allotment (76). Ten per cent. of the shares offered was held to be a sufficient statement of the

(65) *Ibid*, p. 534.

(66) Gore-Browne, 36th ed. p. 32; Hals. p. 90.

(67) Investment Trust Corp'n. v. Singapore Traction Co. [1935] Ch. 615, (C.A.).

(68) Story v. Rees (supra).

(69) Development Co. of C. & W. Africa [1902] 1 Ch. 547; Anglo-French Exploration Co. [1902] 2 Ch. 845.

(70) Greater Britain Re-Insurance Co. [1921] 124 L.T. 194.

(71) Hoare & Co. [1904] 2 Ch. 208.

(72) Boschoeck Proprietary Co. v. Fuke [1906] 1 Ch. 148.

(73) Lundy Granite Co. [1872] 26 L.T. 673.

(74) West Yorkshire Darracq Agency v. Coleridge [1911] 2 K.B. 326.

(75) Young v. Naval, Military & C. Ltd. [1905] 1 K.B. 687.

(76) S. 101. Now see s. 69.

amount (77). The statement of the minimum subscription must be an express statement and not one which can be implied from other statements in the prospectus (78). Now see s. 69.

A person is entitled to revoke his application for shares when, before the date of allotment, the prospectus is changed in material particulars, *e.g.*, the minimum subscription is reduced from Rs. 40,000 to Rs. 10,000 (79).

**352. "Subsequent offer" :—**Where although the first prospectus was headed "for private circulation only", but contained a statement that it had been filed with the Registrar, it was held that this circulation of the first prospectus was an offer to the public, and consequently the second prospectus was a "subsequent offer" and that the first offer ought to have been stated (80). The remedy of the allottee in such a case is in damages against the person responsible for the prospectus, and not by rescission (81). The term "friends" used in a prospectus includes business friends (82).

**353. Instalment :—**If the prospectus names the days upon which instalments of the shares are payable, the company cannot call up the amount more rapidly. But a general statement that "it is anticipated that no further call will be made" does not prevent the company calling up the whole unpaid amount, and an arrangement between the company and its members as to the times at which calls shall be made is not binding on the liquidator in winding up (83).

**354. Fully paid up shares :—**A contract to issue shares as fully paid up will not protect the allottee from having to pay up the whole amount of the shares unless there was good consideration for the contract, *e.g.*, either an existing debt which was extinguished, or a promise to make over property or to do future work (84).

**355. Requirement of the section :** Where the company purchases the benefit of an existing contract, it will be necessary to state both the price paid for such benefit and the price payable under the contract (85). But this section does not require that the prospectus should, in the case of a completed purchase, disclose the amount of the purchase money paid by the vendor upon his acquisition of the property. As to the disclosure of the name of the vendor's vendor, the test seems to be whether any of the cash paid by the company is paid to the original vendor or not (85).

For the meaning of the word "cash" see notes to s. 159.

As to the commission that may be paid to the underwriter see notes to s. 76.

If the terms of the prospectus are afterwards altered, the underwriting agreement may become void (86). See notes to s. 76.

**356. What are preliminary expenses :—**Powers are generally taken in the memorandum of association to pay the preliminary expenses comprising preparation, printing, circulating and advertising the prospectus, and the preparation and print-

(77) *West Yorkshire Darracq Agency* [1908] W.N. 236, 23 T.L.R. 77. S. 101 (2) of the old Act. But now see sub s. (1) of s. 69 and Sch. II of the present Act.

(78) *Rousell v. Burnham* [1909] 1 Ch. 127.

(79) *Rajagopala v. South Indian Rubber Works* [1912] M. 656, [1912] 2 M.L.J. 228, [1912] M.W.N. 475, 203 L.C. 243.

(80) *South of England Natural Gas Co.* [1911] 1 Ch. 573; *Wimbledon Olympia Ltd.* [1910] 1 Ch. 630.

(81) *Ibid* (*South of England &c.*).

(82) *Bansidhar v. Tata Power Co.* [1925] B. 272, 27 Bom. L.R. 330, 87 L.C. 547.

(83) *Cordova Union Gold Co.* [1891] 2 Ch. 580.

(84) *Eddystone Marine Insurance Co.* [1893] 3 Ch. 9.

(85) *Brooks v. Hansen* [1906] 2 Ch. 129.

(86) *Warner International Co. v. Kilburn, Browne & Co.* [1914] W.N. 61, 110 L.T. 456.

ing of the memorandum and articles of association as well as the fees, stamps and registration expenses. But even without the powers a company may pay the preliminary expenses including commission for placing the shares (87). A promoter however cannot recover them if the company refuse to pay, even where there is a provision in the memorandum or the articles in this behalf (88); for provisions thereof cannot be taken advantage of by the outsiders or even by the members in any other capacity than that of the members (89). A statement in the articles of association that the company shall pay the preliminary expenses of forming the company does not give the promoters or the solicitor a right to be paid the expenses incurred by them (90).

**357. Notice of contents of contracts** :—A prospectus, which merely specifies the dates of and names of parties to contracts, does not give notice of circumstances contained in the contracts which are material to be known, and the omission causes the prospectus to give a false impression (91). The mere statement in the prospectus of the dates and parties to the agreement under which the promoter took a secret profit not being a sufficient disclosure to the shareholders, he was liable as a promoter who had received a secret profit (92). Where a director issued a prospectus which omitted to disclose a material contract, he “knowingly issued” the prospectus where he had a general knowledge of the existence of contracts which might fall within the section and be made no inquiries into these contracts, but relied upon the assurance of the company’s solicitor that the prospectus disclosed all such contracts (93). “In my opinion,” said Swinfen Eady J., “the contract . . . was a material contract and should have been disclosed in the prospectus, and as it appears from the minutes that all the directors were aware of this contract they were all liable under s. 38 of the Act of 1867 to such of the plaintiffs as took shares on the faith of the prospectus” (94).

**358. “Material contract”** :—A material contract under this section appears to be one which, upon a reasonable construction of its purport and effect, would assist a person in determining whether he would become a shareholder in the company (95), or one which is calculated to influence persons in making up their minds whether or not they will apply for shares (96). In this connection see also *Gluckstein v. Barnes* (97).

A contract may be material although it has been wholly carried out. A mistaken view in this respect is no answer to an action based on non-disclosure, however honest the directors might have been (98).

**359. Construction—estoppel** :—Where a clause in a prospectus refers to an agreement and purports to set out its effect with the knowledge and acquiescence of the other contracting party or his duly authorised agent, the latter is thereby estopped from setting up any other construction of the agreement (99).

(87) *Metropolitan C. C. Assn. v. Scrimgeour* [1895] 2 Q.B. 604; *Licensed Victuallers' M. T. Assn.* [1889] 42 Ch. D. 1.

(88) *Rotherham Alum Chemical Co.* [1883] 25 Ch. D. 103.

(89) *Browne v. La Trinidad* [1887] 37 Ch. D. 1.

(90) *English & Colonial Produce Co.* [1906] 2 Ch. 435.

(91) *Aaron's Reefs v. Twiss* [1896] A.C. 273. See also *J. & P. Coates, Ltd. v. Crossland* [1904] 20 T.L.R. 800.

(92) *Sale Hotel & Co.* [1897] 77 L.T. 681.

(93) *Tait v. Macleay* [1904] 2 Ch. 631.

(94) *J. & P. Coates, Ltd. v. Crossland*, *supra*.

(95) *Sullivan v. Mitcalfe* [1880] 5 C.P.D. 435 at p. 465.

(96) *Twycross v. Grant* [1877] 2 C.P.D. 469 at p. 485; *Broome v. Speak* [1903] 1 Ch. 586, 619 & 677 affirmed *sub nom.* *Shepherd v. Broome* [1904] A.C. 342.

(97) [1900] A.C. 240.

(98) *Shepherd v. Broome* (*supra*).

(99) *De Tchiatchee v. Salerni Coupling Ltd.* [1932] 1 Ch. 330.

**360. Effect of non-disclosure** :—If the contract is not disclosed, any person who has taken shares on the faith of the prospectus can claim damages suffered by him (1); but he must prove that if he had known the undisclosed contract, he would not have become a shareholder (2). Where there is no fraud in fact and the non-disclosure is owing to an honest mistake, a subscriber of shares, who has agreed to waive any fuller compliance with the section than is contained in the prospectus, cannot maintain an action for damages (2).

**361. Effect of failure to comply with the provisions** :—Under this section a company is not absolved from the liability under s. 62 (3). The failure to comply with the provisions of this section may in some cases give a right to rescind the contract to take shares, or to damages against the directors; but to establish such a right it is necessary to prove more than mere omission of one or more of the particulars (4) and in such a case the remedy is not against the company in rescission or damages but against the persons responsible for the omission (5).

**362. Liability—for breach of a statutory duty** :—The law of liability for breach of a statutory duty has thus been stated by Fletcher-Moulton, L. J. : "If by a statute a duty is laid on any person, every member of the public has a right to have the duty performed. The breach of it does not give every member of the public a right of action, because damage is an essential part of such cause of action; but it is settled law that where damage has accrued to any person through breach of statutory duty by another person the latter is liable" (6).

**363. Loss as a natural result of default** :—It will be necessary for the complaining party to show that his loss has arisen as a natural result of the defendant's default in complying with his statutory duty. He must satisfy the Court that if the proper statements had been contained in the prospectus, he would not have taken the shares (7). But the party alleging misrepresentations will be pinned down to the misrepresentations alleged in his pleadings (8).

**364. Misrepresentation in prospectus** :—No misrepresentation or concealment of any material facts or circumstances will be permitted in a prospectus. The public are entitled to have the opportunity of judging of everything material to a knowledge of the true character of the undertaking (9). Where a person has been, by the fraudulent misrepresentations of directors or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, and he may rescind it (10). A contract induced by fraud is not void but voidable, and therefore though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights which they may enforce against the party who has been so induced to enter into it (10). Under the exception in s. 19 of the Indian Contract Act the contract, even if caused by misrepresentation, would not be voidable, if the defendant had the means of discovering the truth with ordinary diligence.

- (1) *Wimbledon Olympia* [1910] 1 Ch. 630; *Nash v. Calthorpe* [1905] 2 Ch. 237; see also *Macleay v. Tait* [1906] A.C. 24; *Marshall v. Morrison* [1907] W.N. 29; *Watts v. Bucknall* [1903] 1 Ch. 766, 773.
- (2) *Capel & Co. v. Sim's S. C. Co.* [1888] 58 L.T. 807; *Macleay v. Tait* (supra).
- (3) *Shunmugam v. Ranga Rama* [1934] M. 641, 67 M.L.J. 437, 152 I.C. 703.
- (4) *Wimbledon Olympia Ltd.* [1910] 1 Ch. 630.
- (5) *South of England Natural Gas Co.* (supra).
- (6) *David v. Britannic Merthyr Coal Co.* [1909] 2 K.B. 146 at p. 157.
- (7) *Nash v. Crilthorpe* [1905] 2 Ch. 237; *Macleay v. Tait* [1906] A.C. 24.
- (8) *Mohun Lal v. Sri Gungaji Cotton Mills Co.* [1900] 4 C.W.N. 369.
- (9) *Central Ry. Co. of Venezuela v. Kisch* [1867] L.R. 2 H.L. 99.
- (10) *Oakes v. Turquand* [1867] L.R. 2 H.L. 325; *Jagannath v. Official Liquidator* [1938] All. 301, [1938] A. 193.

The application of that exception is not restricted to cases where the party is fixed with constructive notice of the true state of affairs (8).

The statements made in a prospectus are the representations of the company, and where there are misrepresentations, the allottee is entitled to have his contract set aside and to be repaid the amount of his deposit money (11). If there is a material misrepresentation in the prospectus upon which a shareholder relied when applying for shares, he is entitled, provided he seeks relief within a reasonable time after learning the truth and before the company is in liquidation, to have his name removed from the register and the amount paid upon the shares returned with interest (12). Only original subscribers and not the purchasers of shares can obtain damages (13), unless the prospectus was issued with a view to induce persons to become purchasers (14). As to what should be proved to obtain rescission of the contract to take shares and to establish the company's responsibility, see the cases noted below (15). A variance between a prospectus and the memorandum of association will not, necessarily and as a matter of course, relieve a member from his liability as a contributory (16).

A shareholder's contract to purchase shares from the company is only voidable and not void on account of misrepresentation in the prospectus (17). But he has not unlimited time within which to rescind the contract. He must rescind it promptly, that is within a reasonable time of his becoming aware of the fraud giving him the right to rescind (17).

The aggrieved party cannot, as against the company, retain the shares and claim damages (18). The relief can be claimed even after the shares have been forfeited (19). Where the forfeiture is not complete the Court will restrain the company from forfeiting the shares pending an action for rescission, usually requiring the plaintiff to pay into Court the amount of the call (20). The aggrieved party need not show that the statement in the prospectus was made fraudulently or was known to the person making it to be untrue (21).

If the statement is true at the time it is made and becomes untrue before allotment of the shares, as for instance, if a director named in the prospectus has meanwhile resigned, it will be a good ground for rescission (22).

**365. What may amount to misrepresentation :—**Omission of material facts may amount to a misrepresentation (23). But "in an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers may be of opinion that these would have been of materiality as influencing the exercise of their judgment" (24). On "the other hand, if by a number of statements you intentionally

(11) *Romanath Gossain's Case* [1867] 2 Ind. Jur. N.S. 296.

(12) *Scottish Petroleum Co.* [1883] 23 Ch. D. 413; *Metropolitan Coal Consumers' Association*, *Karberg's case* [1892] 3 Ch. 1; *Mohun Lal v. Sri Gungaji & Co.* (supra); *Central Ry. Co. of Venezuela v. Kisch* [1867] L.R. 2 H.L. 99.

(13) *Peck v. Gurney* [1873] 6 H.L. 377.

(14) *Andrews v. Mockford* [1896] 1 Q.B. 372.

(15) *Redgrave v. Hurd* [1881] 20 Ch. D. 1; *Karberg's case* (supra); *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392 at p. 423 and *Lynde v. Anglo Italian Hemp Spinning Co.* [1896] 1 Ch. 178.

(16) *Oakes v. Turquand* [1887] L.R. 2 H.L. 325; *Jagannath v. Official Liquidator* [1938] All. 301, [1938] A. 193.

(17) *Shiromani Sugar Mills v. Devi Prasad* [1950] A. 508.

(18) *Houldsworth v. City of Glasgow Bank* [1880] 5 App. Cas. 317.

(19) *Aaron's Reefs v. Twiss* [1896] A.C. 273 at p. 287.

(20) *Lamb v. Sambas Rubber & Co.* [1908] 1 Ch. 845.

(21) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392.

(22) *Scottish Petroleum Co.* [1881] 17 Ch. D. 373; *Scottish Petroleum Co.* [1883] 23 Ch. D. 413; *Kent County Gas Co.* [1907] 95 L.T. 756.

(23) *Cackett v. Keswick* [1902] 2 Ch. 456.

(24) *Per Lord Watson in Aaron's Reefs v. Twiss* [1896] A.C. 273 at p. 287.

give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue" (25). The prospectus must be taken as a whole, for "everybody knows that half a truth is no better than a downright falsehood" (26).

**366. Estoppel :—**Where a party having a right to rescind his contract, after having knowledge of such right does any act affirming his contract, he cannot afterwards set up his right to avoid the contract (27). Therefore any act by a shareholder recognizing his position as a member after knowledge of the misrepresentation such as selling or trying to sell his shares, attending meetings, signing proxies, paying calls or accepting dividends will prevent him from obtaining rescission, even though done under a mistake as to his rights (28), unless he has meanwhile definitely elected to rescind the contract as by commencing proceedings (29).

**367. Aggrieved party must seek relief within a reasonable time :—**The complaining party should come within a reasonable time (30), as the rights and interests of other persons may intervene. "Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after discovery of fraud or misrepresentation" (31). He must also seek relief while the company is a going concern, for upon the commencement of liquidation, voluntary or otherwise, the creditors and shareholders are interested in retaining his name on the register, and against them he has no claim to set aside the bargain (32). But where a counter-claim for rescission of the contract to take shares was delivered after the petition and before the winding up order was made, the shareholder was not too late to apply for relief (33).

It is true that a shareholder cannot be relieved from his shares after a winding up application. But if he has started active proceedings to be relieved of his shares, the passing of a winding up order during their pendency would not prevent his getting the relief (34). The reason why a shareholder cannot throw back his shares upon the company after a winding up is that the rights of third parties have intervened, and equities which would be sufficient as between the shareholder and the company cannot be set up as against the creditors or the contributories (34).

It is not enough to serve the company with a notice of repudiation. The aggrieved party must either procure the company to remove his name from the register, or commence proceedings to compel it to do so (35).

**368. Where no right of rescission :—**Where there is omission to state some fact which ought under this section to be stated, and the omission does not falsify that which is stated, there is no right of rescission (36). "Where parties are con-

(25) Ibid, per Halsbury L. C. at p. 281.

(26) Per Lord Macnaghten in *Gluckstein v. Barnes* [1900] A.C. 240 at pp. 250-51.

(27) *Clough v. London & N. W. Ry.* [1871] L.R. 7 Ex. 26.

(28) *Dunlop T. Cycle Co.* [1895] 75 L.T. 385.

(29) *Tomlin's case* [1898] 1 Ch. 104.

(30) *Oakes v. Turquand* infra; *Jagannath v. Official Liquidator* (supra).

(31) Per Lord Davey in *Aaron's Reels v. Twiss* [1896] A.C. 273 at p. 294; see *Scottish Petroleum Co.* [1883] 23 Ch. D. 313 and *Central Ry. Co. v. Kisch* [1867] L.R. 2 H.L. 99.

(32) *Oakes v. Turquand* [1867] L.R. 2 H.L. 325; *Tennent v. Glasgow Bank* [1879] 4 App. Cas. 615; *Scottish Petroleum Co.* (supra).

(33) *Whiteley's case* [1900] 1 Ch. 365.

(34) *Shiromani Sugar Mills v. Debi Prasad* [1950] A. 508.

(35) *Thompson's case* [1898] 5 Mans. 282.

(36) *Whimbleton Olympia Ltd.* [1910] 1 Ch. 630; *South of England Natural Gas Co.* [1911] 1 Ch. 573; see also *Twycross v. Grant* (supra); *Broome v. Speak* (supra); *Shepherd v. Broome* (supra); *Watts v. Bucknall* (supra).

tracting with one another, each may, unless there is a duty to disclose, observe silence in regard to facts which he believes would be operative upon the mind of the other" (37). "Simple reticence does not amount to legal fraud" (38). An innocent misrepresentation in a prospectus may however be a ground for rescission (39). In the following cases there is no right of rescission for misrepresentation and non-disclosure in the prospectus: Where the allottee subscribed for the shares before he saw the prospectus (40); where the prospectus itself showed that the statements made therein were based on hearsay and were to be verified later on (41); where the allottee did not rely on the statements, but made investigations himself (42); where he is a man of such experience that he is not likely to be misled by the statements in the prospectus (43).

**369. Remedy of person taking shares from an allottee:—**A person who takes shares not from the company, but from a person to whom they were allotted, has no remedy against the company (44). But this rule does not apply where the prospectus is intended and used to induce purchasers in the market to buy the shares (45). The statutory liability created by this section is cumulative and not in substitution of the law of deceit (46).

For statement of principles as to (1) fiduciary relationship between promoters and shareholders, (2) validity of contracts between a company and its directors as promoters, (3) non-liability of directors for losses when acting *intra vires* and honestly, (4) voidability of a contract for misrepresentations, and (5) impossibility of rescinding a contract after change of position, see the case noted below (47).

As to a shareholder's right against the directors or other persons who have issued a false prospectus, see notes to s. 62.

**370. Penalty:—**See s. 59. As to the civil liability for misstatements in prospectus see s. 62 and as to the criminal liability, see s. 63.

**371. Sub-s. (3):—**This sub-section corresponds to sub-s. (2) of s. 96 of the old Act which was only a provision for the due compliance with the conditions mentioned therein and had no bearing on the contractual relationship between the intending shareholder and the company. The only consequence which that sub-section contemplated was a penalty on the offending official (48). The mere fact that the legislature had not included s. 96 in s. 102 (of the old Act) could not lead to the inference that a contract in contravention of sub-s. (2) of s. 96 (of the old Act) was deemed to be void (48).

**57. Expert to be unconnected with formation or management of company.—**A prospectus inviting persons to subscribe for shares in or debentures of a company shall not include a statement purporting to be made by an expert, unless

(37) *Per Frv J.* in *Davis v. London Provincial M. I. C.* [1878] 8 Ch. D. 469 at p. 474 see also *Turner v. Green* [1895] 2 Ch. 209.

(38) *Walters v. Morgan* (1861) 3 De G. F. & J. 718.

(39) *Rees River Silver Mining Co.* [1867] 2 Ch. App. 601.

(40) *Smith v. Chadwick* [1882] 20 Ch. D. 68.

(41) *British Burmah Lead Co.* [1887] 56 L.T. 815.

(42) *Jennings v. Broughton* [1854] 23 L.J. Ch. 999.

(43) *Hallows v. Fernie* [1868] 3 Ch. App. 467.

(44) *Peck v. Gurney* [1873] L.R. 6 H.L. 377.

(45) *Andrews v. Mockford* [1896] 1 Q.B. 372.

(46) *Aaron's Reefs v. Twiss* [1896] A.C. 273.

(47) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392.

(48) *Mansukhlal v. Jupiter Airways Ltd.* [1955] B. 112.



the expert is a person who is not, and has not been, engaged or interested in the formation or promotion, or in the management, of the company.

This section is new. It has been inserted by the Joint Committee with the following remarks:—"The Committee are of the view that no person who is connected either with the formation or with the management of a company should function as an 'expert'. This is provided in clause 56 (now s. 57). The penalty clause has, as a consequential change, been removed from clause 57 (now s. 58) and placed as clause 58 (now s. 59) which will apply both to clause 57 (now s. 58) and to new clause 56 (now s. 57)" (*vide* J. C. R., para 25).

**58. Expert's consent to issue of prospectus containing statement by him.**—A prospectus inviting persons to subscribe for shares in or debentures of a company and including a statement purporting to be made by an expert shall not be issued, unless—

(a) he has given his written consent to the issue thereof with the statement included in the form and context in which it is included, and has not withdrawn such consent before the delivery of a copy of the prospectus for registration ; and

(b) a statement that he has given and has not withdrawn his consent as aforesaid appears in the prospectus.

This section is new. It is based on redraft of s. 94 by the C.L.C. and s. 40 of the English Act of 1948. Only some verbal improvements have been sought to be effected—*Notes on Clauses*. See notes to s. 57.

**372. Report of expert :** If the prospectus is based upon the report of an expert which contains false statements of fact, a person who applied for shares relying on the report may rescind the contract, unless the directors had clearly warned the public that they did not vouch for the accuracy of the report (49). Concealment in a prospectus may amount to fraud (50).

**59. Penalty and interpretation.**—(1) If any prospectus is issued in contravention of section 57 or 58, the company, and every person, who is knowingly a party to the issue thereof, shall be punishable with fine which may extend to five thousand rupees.

(2) In sections 57 and 58, the expression "expert" includes

(49) *Mair v. Rio Grande Rubber Estate*, [1913] A.C. 853 at p. 872 ; *Pacaya Rubber &c. Co.* [1914] 1 Ch. 542.

(50) See *Christenville Rubber Estates* [1911] W.N. 216, 28 T.L.R. 38, *Shepherd v. Broome* [1904] A.C. 342 ; *Pacaya Rubber &c. Co.*, *supra* ; *Mair v. Rio Grande Rubber Estates*, *supra*.

an engineer, a valuer, an accountant and any other person whose profession gives authority to a statement made by him.

This section has been inserted by the Joint Committee. See notes to s. 57 *ante*.

**60. Registration of prospectus.—**(1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto—

(a) any consent to the issue of the prospectus required by section 58 from any person as an expert ; and

(b) in the case of a prospectus issued generally, also—

(i) a copy of every contract required by clause 16 of Schedule II to be specified in the prospectus, or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof ; and

(ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(2) Every prospectus to which sub-section (1) applies shall, on the face of it,—

(a) state that a copy has been delivered for registration as required by this section ; and

(b) specify any documents required by this section to be endorsed on or attached to the copy so delivered, or refer to statements included in the prospectus which specify those documents.

(3) The Registrar shall not register a prospectus,—

(a) unless it is dated and the copy thereof signed in the manner required by this section and unless further it has endorsed thereon or attached thereto the documents (if any) specified as aforesaid ; and

(b) in case the prospectus names any person as the auditor, legal adviser, attorney, solicitor, banker or broker of the company or proposed company, unless also it is accompanied by the consent in writing of the person so named, to act in the capacity stated.

(4) No prospectus shall be issued more than ninety days after the date on which a copy thereof is delivered for registration ; and if a prospectus is so issued, it shall be deemed to be a prospectus a copy of which has not been delivered under this section to the Registrar.

(5) If a prospectus is issued without a copy thereof being delivered under this section to the Registrar or without the copy so delivered having endorsed thereon or attached thereto the required consent or documents, the company, and every person who is knowingly a party to the issue of the prospectus, shall be punishable with fine which may extend to five thousand rupees.

This section is based on s. 92 of the old Act, redraft of s. 95 by the C.L.C. and s. 41 of the English Act of 1948. A few drafting changes of no great consequence have been made —*Notes on Clauses*.

See notes to s. 55.

**61. Terms of contract mentioned in prospectus or statement in lieu of prospectus, not to be varied.**—A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of, or except on authority given by, the company in general meeting.

This section corresponds to s. 99 of the previous Act. It is based on s. 96 of the C.L.C.'s redraft and s. 42 of the English Act of 1948. It may be noted that the C.L.C.'s redraft makes the provisions applicable to all companies whether or not they have a share capital and the exemption contained in s. 42 (2) of the English Act in regard to private companies has also been omitted. This section in both respects follows the C.L.C.'s redraft—*Notes on Clauses*.

The words "or except on authority given by", have been inserted by the Joint Committee.

**62. Civil liability for mis-statements in prospectus.**—

(1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he

may have sustained by reason of any untrue statement included therein, that is to say,—

(a) every person who is a director of the company at the time of the issue of the prospectus ;

(b) every person who has authorised himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of time ;

(c) every person who is a promoter of the company ; and

(d) every person who has authorised the issue of the prospectus :

Provided that where, under section 58, the consent of a person is required to the issue of a prospectus and he has given that consent, or where, under clause (b) of sub-section (3) of section 60, the consent of a person named in a prospectus is required and he has given that consent, he shall not, by reason of having given such consent, be liable under this sub-section as a person who has authorised the issue of the prospectus except in respect of an untrue statement, if any, purporting to be made by him as an expert.

(2) No person shall be liable under sub-section (1), if he proves—

(a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent ;

(b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent ;

(c) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason therefor ; or

(d) that—

(i) as regards every untrue statement not purporting to be made on the authority of an expert or of a

public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true ; and

(ii) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation ; and he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that that person had given the consent required by section 58 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder ; and

(iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the document :

Provided that this sub-section shall not apply in the case of a person liable, by reason of his having given a consent required of him by section 58, as a person who has authorised the issue of the prospectus in respect of an untrue statement purporting to be made by him as an expert.

(3) A person who, apart from this sub-section, would, under sub-section (1), be liable by reason of his having given a consent required of him by section 58 as a person who has authorised the issue of a prospectus in respect of an untrue statement purporting to be made by him as an expert, shall not be so liable, if he proves—

(a) that, having given his consent under section 58 to the issue of the prospectus, he withdrew it in writing before delivery of a copy of the prospectus for registration ;

(b) that, after delivery of a copy of the prospectus for registration and before allotment thereunder, he, on becoming aware of the untrue statement, withdrew his

consent in writing and gave reasonable public notice of the withdrawal and of the reason therefor ; or

(c) that he was competent to make the statement and that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, believe, that the statement was true.

(4) Where—

(a) the prospectus specifies the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof ; or

(b) the consent of a person is required under section 58 to the issue of the prospectus and he either has not given that consent or has withdrawn it before the issue of the prospectus ;

the directors of the company excluding those without whose knowledge or consent the prospectus was issued, and every other person who authorised the issue thereof, shall be liable to indemnify the person referred to in clause (a) or clause (b), as the case may be, against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or of the inclusion therein of a statement purporting to be made by him as an expert, as the case may be, or in defending himself against any suit or legal proceeding brought against him in respect thereof :

Provided that a person shall not be deemed for the purposes of this sub-section to have authorised the issue of a prospectus by reason only of his having given the consent required by section 58 to the inclusion therein of a statement purporting to be made by him as an expert.

(5) Every person who, becomes liable to make any payment by virtue of this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the former person was, and the latter person was not, guilty of fraudulent misrepresentation.

(6) For the purposes of this section—

(a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus or of

the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ; and

(b) the expression "expert" has the same meaning as in section 58.

This section corresponds to s. 100 of the previous Act. It is based on s. 97 of the C.L.C.'s redraft and s. 43 of the English Act of 1948. Some minor drafting changes have been made—*Notes on Clauses*.

In sub-s. (5) some verbal alterations have been made by the Joint Committee

**372A.** : This section reproduces the provisions of the Directors' Liability Act passed in England in 1890 for the purpose of strengthening the law as enunciated by the House of Lords in *Derry v. Peek* [1889] 14 App. Cas. 337 in respect of directors' liabilities. "Now the Directors' Liability Act was passed in 1890, the year after *Derry v. Peek* was decided in the House of Lords, and as it seems to me, for the express purpose of getting rid of the effect of that decision, so far and so far only as directors and promoters issuing a prospectus on the one hand and persons taking shares and debentures on the other hand are concerned" (51).

**373. Scope** :— This section is confined to prospectus issued by or on behalf of the company and the directors are not liable to purchasers from third parties (52). But see s. 64. Where the plaintiff succeeds on a cause of action under this section, he would be entitled to such "compensation" as he might prove in addition to any damages recovered in respect of fraudulent misrepresentation (53).

This section has created new statutory liabilities in addition to the general law of deceit.

**374. Prospectus ought not to misrepresent facts** :— A prospectus ought not to misrepresent actual and material facts or to conceal facts material to be known the misrepresentation or concealment of which may improperly influence and mislead the mind of the reader ; for if he is thereby deceived into becoming an allottee of shares and in consequence suffers loss, he is entitled to proceed against those who thus misled him (54). Where a company issues a prospectus, a person contracting to take shares on the statement therein contained has a right not to be misled by any statement actually false but to be informed of all the facts the knowledge of which might reasonably have deterred him from so contracting ; and if the prospectus in that sense contains misrepresentation, or the absence of true representation, the contract will not be enforced (55). As to what concealment or ambiguity amounts to misrepresentation, see the last cited case. But mere non-disclosure of facts, unless such non-disclosure had the effect of making the disclosed facts absolutely false, would not be sufficient to sustain a proceeding which is really in the nature of an action for misrepresentation (56). Delay cannot be set up as an answer to such a suit (56).

(51) *Mc Connel v. Wright* [1903] 1 Ch. 546.

(52) *Urquhart v. Stracey* [1928] N.I. 40 affirmed by C.A. [1928] N.I. 162, on appeal to the House of Lords see *Clark v. Urquhart* [1930] A.C. 28.

(53) *Ibid.*

(54) *Peek v. Gurney* [1874] L.R. 6 H.L. 377 per Lord Cairns.

(55) *New Brunswick &c. Land Co. v. Muggerridge* [1860] 1 Dr. & Sm. 363.

(56) *Peek v. Gurney* (supra).

A prospectus may be "false in material particulars" within the meaning of s. 84 of the (English) Larceny Act, 1861, if by a number of statements a false impression with regard to the financial position of a company is intentionally conveyed, although each statement taken by itself is true (57). See notes to s. 628 *post*.

**375. Purpose when exhausted :—**The proper purpose of a prospectus is to invite persons to become allottees of the shares. When the allotment is completed the office of the prospectus is exhausted and a person who has not become an allottee, but is only a subsequent purchaser of shares in the market, may not be so connected with the prospectus as to render those who issued it liable to indemnify him against losses suffered in consequence of the purchase (58); for the vendee must show some direct connection between them and himself in the communication of the prospectus and its influence upon his conduct in becoming an allottee (58).

**376. Meaning of "subscribe" :—**Subscription means application followed by allotment, and not subsequent purchase (59). An "untrue statement" is a statement in fact untrue, and not a statement in the belief of the directors untrue (60). It is immaterial that the statement was not fraudulent (61).

**377. Compensation :—**"Compensation" must be estimated and awarded with reference to the loss sustained, and does not resemble a penalty (62). In the case of *Clark v. Urquhart* (52), *supra*, Lord Sumner traced the history of the section from the decision of the House of Lords in *Derry v. Peek* (63) and held that the word "compensation" had no technical significance. The word was selected because it represented the difference between the actual value of the shares or debentures taken and the sums paid for them on the face of the prospectus and at the same time avoided the invidious association of "damages" with dishonesty in such connection (64). On this point their Lordships reversed the judgment of the Court of Appeal in *Urquhart v. Stacey* (65). As to the measure of damages and evidence thereof see *Stevens v. Hoare* (66).

**378. Meaning of "promoter" :—**"The term 'promoter,'" says Lord Justice Bowen (67), "is not a term of law but of business usefully summarising up in a single word a number of business operations familiar to commercial world by which a company is generally brought into existence." It is a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company (68). It involves the idea of exertion for the purpose of getting up and starting a company or what is called "floating" it (69), and also the idea of some duty towards the company imposed by, or arising from, the position which the so-called promoter assumes towards it (70). In *Twycross*

(57) *King v. Kysant* [1932] 1 K.B. 442.

(58) *Peek v. Gurney* [1874] L.R. 6 H.L. 377 per Lord Cairns.

(59) *Peek v. Gurney* (*supra*).

(60) *Broome v. Speak* [1903] 1 Ch. 586 (C.A.).

(61) *Shepherd v. Broome* [1904] A.C. 342.

(62) *McEwan v. Campbell* [1857] 2 Macq. 499.

(63) [1889] 14 App. Cas. 337.

(64) *Clark v. Urquhart* [1930] A.C. 28, 56-57.

(65) [1928] N.I. 162.

(66) [1904] 20 T.L.R. 407.

(67) *Whaley Bridge Calico Printing Co. v. Green and Smith* [1879] 5 Q.B.D. 109.

(68) *Erlanger v. New Sombrero Phosphate Co.* [1878] 3 App. Cas. 1218.

(69) As to the meaning of "floatation" see *Gifford and Willoughby's M. Expedition Co.* [1899] 15 T.L.R. 24 (C.A.), on appeal [1902] 18 T.L.R. 274, and *Torva E. Syndicate v. Kelley* [1900] 16 T.L.R. 495 (P.C.).

(70) *Emma Silver Mining Co. v. Lewis & Son* [1879] 4 C.P.D. 396; *Re Great Wheal Polgooth Co.* [1883] 53 L.J. (Ch.) 42, 49 L.T. 20.



v. *Grant* (71) Cockburn C. J. defined the word "promoter" as being one who undertakes to form a company with reference to a given project and to set it going and to take the necessary steps to accomplish that purpose. After referring to a number of authorities Sri Francis Palmer in his *Company Precedents* 15th ed. (1938) p. 110 observes: "It is obvious therefore that a person who originates the scheme for the formation of the company, has the memorandum and articles of association prepared, executed and registered, and finds the first directors, settles the terms of preliminary contracts and prospectus (if any), and makes arrangement for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this control which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls. But a person who has done much less than this—takes a much less prominent part—may bring himself within the meaning of the term and may be held liable as promoter (72).

**379. Term ambiguous :-** The term is however ambiguous and it is necessary to ascertain in each case what the so-called promoter really did, before his legal liabilities can be actually ascertained (73). The question whether a person is or is not a promoter is a question of fact (71). A person who as principal procures or aids in procuring the incorporation of a company is generally a promoter thereof (74), and he does not escape from liability by acting through agents (75). But persons who act only professionally, such as counsel, solicitors, accountants, printers of prospectus and the like are not promoters (76).

**380. Promoter :—**It is a question of fact in each case as to at which time a person begins or ceases to be a promoter (77). A promoter does not cease to be such by reason only of the formation of the company and the appointment of directors, but only when the directors take into their own hands what remains to be done in the way of forming the company (78).

**381. Principles governing position of directors and promoters :-** The principles governing the position of directors and promoters and their acts have thus been laid down by Lord Lindley (79): "The first principle is that in equity the promoters of a company stand in a fiduciary relation to it and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know. *Erlanger v. New Sombrero Phosphate Co* [1878] 3 App. Cas. 1218 is the leading authority in support of this proposition."

"The second principle is that a company when registered is a corporation capable by its directors of binding itself by a contract with themselves if all material facts are disclosed. *Salomon v. Salomon & Co.* (80) is the leading authority for this proposition."

(71) *Twycross v. Grant* [1877] 2 C.P.D. 469.

(72) See also *National L. S. Registration Bank v. Velu Mudaliar* [1938] Mad. 192, [1938] M. 154.

(73) *Lydney & Co. v. Bird* [1886] 33 Ch. D. 85 (C.A.).

(74) *Hereford & Co.* [1876] 2 Ch. D. 621 (C.A.).

(75) *Phosphate Sewage Co. v. Hartmont* [1877] 5 Ch. D. 394 (C.A.).

(76) *Great Wheal Polgooth Co.* (supra).

(77) *Ladywell Mining Co. v. Brookes* [1887] 35 Ch. D. 400 (C.A.).

(78) *Eden v. Ridsdale's Ry. Lamp Co.* [1889] 23 Q.B.D. 308 (C.A.).

(79) *Lagunus Nitrate Co. v. Lagunus Nitrate Syndicate* [1899] 2 Ch. 392 at p. 422.

(80) [1897] A. C. 22.

"The third principle is that the directors of a company acting within their powers and with reasonable care and honesty in the interest of the company may suffer by reason of their mistakes or errors in judgment. *Overend, Gurney & Co. v. Gibb* (81) is the leading authority on this head."

"A fourth principle not confined to companies, but extending to them, is that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent."

"A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception."

**382. Liabilities of directors and promoters :—**A promoter cannot retain any profit made out of a transaction to which the company is a party, without full disclosure. The company can affirm the contract and sue for an account and profit with interest (82) or bring an action for rescission of the contract where the other contracting party can be restored to its original position (83). The mere statement in the prospectus of the date and parties to the agreement under which the promoters took a secret profit not being a sufficient disclosure to the shareholders, he was liable as a promoter who had received a secret profit (84). Whatever secret benefit a promoter makes, he is bound to make it good to the company (85).

A promoter may however make a profit upon a sale to the company, even if he is also a director, if he makes full disclosure to the company (86). Whether a promoter is really acquiring any assets as a trustee for the company or the intended company is a question of fact. Where the scheme has throughout been that the promoter is to sell to the intended company at a profit the assets he is acquiring, the natural inference of fact is that in respect of those assets he is not intending to be a trustee for the company, but is intending to occupy the position of vendor. The relationship, when completed with promoters, involves certain fiduciary duties, but cannot be identified with ordinary trusteeship (87). If there is no intention of making a public issue of shares and no such issue is in fact made, the knowledge by all the directors and members of the fact will exonerate the promoters even where the purchase price has been greatly inflated (88). But promoters cannot relieve themselves of their general equitable obligations by any astuteness in the drafting of the articles (87).

**383 Their fiduciary relation :—**Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company and must fully state to the company (89) the facts which apply to the property and would influence the company in deciding on the reasonableness of acquiring it (90).

(81) [1872] L. R. 5 H. L. 180.

(82) *Gluckstein v. Barnes* [1900] A. C. 240.

(83) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* (supra); *Cross v. Mutual R. S. Insurance Co.* [1904] 21 T. L. R. 15; *Mutual R. L. I. Co. v. Foster* [1904] 20 T. L. R. 715 (H.L.).

(84) *Sale Hotel &c. Co.* [1897] 77 L. T. 681.

(85) *Anderson v. Spence's Hotel Co.* [1866] 1 Ind. Jur. N. S. 295 & 378.

(86) *Erlanger v. New Sornbrero Phosphate Co.* (infra).

(87) *Omnium Electric Palaces v. Baines* [1914] 1 Ch. 322.

(88) *Attorney General for Canada v. Standard Engineering Trust Co.* [1911] A.C. 498; *Express Engineering Works* [1920] 1 Ch. 466.

(89) *Twycross v. Grant* (infra).

(90) *Erlanger v. New Sornbrero Phosphate Co.* [1878] 3 App. Cas. 1218; *Twycross v. Grant* [1877] 2 C.P.D. 469.

**384. Principles of the law of agency and trustee apply :—**Although strictly speaking a promoter cannot be considered an agent or trustee for the company, the company not being in existence at the time, yet the principles of law of agency and trusteeship are applicable to his case and he is accountable for all moneys obtained by him from the funds of the company without its knowledge (91). The fact that the promoter is acting as agent for the vendors in getting up a company for the purchase of their property does not exonerate him from accounting to the company, when formed, for any secret profit made by him (91). In estimating the amount of the secret profit the promoter is however entitled to be allowed the legitimate expenses incurred by him in forming and bringing out the company, such as those for the reports of surveyors, the charges of solicitors and brokers, and the costs of advertisement, but not a sum of money which he has expended in obtaining from another person a guarantee for the taking of shares (92).

**385. Promoter's liability to account :—**Any profit which the promoter makes after he has begun to promote the company and the benefit of any contracts into which he enters during that period belongs to the company (93). Where a promoter is to account to the company for secret profits, the measure of damages is the amount of profit made by the promoter (94); but he is allowed to deduct all reasonable expenses and is liable only for the net profits made (95).

Immediately after registration of the company a promoter is under fiduciary obligations not only to the company as originally constituted, but also as consisting of future allottees and therefore the promoters and directors will not be protected by disclosures made before the public have joined the company (96). Even if all the facts are known to all the members of the company at the time the contract is made, but a misleading prospectus is subsequently issued by the promoters to the public inviting them to join the company, the promoters will be liable (97).

**386. Personal liability of promoters :—**A promoter, even though he expressly purports to act as agent or trustee, is personally liable upon all contracts made with him on behalf of the intended company (98), until the contract has been performed or rescinded by either party under some power in the contract or by the consent of all parties or until the company has, with the consent of the other contracting party, undertaken the promoter's liability (99).

**387. Legitimate expenses when payable :—**Although not bound to do so, the directors may pay a promoter legitimate expenses incurred by him in forming and bringing the company out (1). Even where there is a general power to pay preliminary expenses to a promoter, payment should not be made without vouchers or investigation (2); but if the memorandum or articles empower directors to pay a specific sum for the costs and expenses of promoters, payment may be made without taxation (3).

Where fully paid up shares were allotted to a promoter on the broad footing that he had expended unclaimed sums on the company's property, partly before and

(91) *Lydney &c. Co. v. Bird* [1886] 33 Ch. D. 85 (C.A.).

(92) *Lydney &c. Co. v. Bird* [1886] 33 Ch. D. 85.

(93) *Ladywell Mining Co. v. Brooks* [1887] 35 Ch. D. 400.

(94) *Leeds and Hanley Theatres of Varieties* [1902] 2 Ch. 809.

(95) *Lydney &c. Co. v. Bird* (supra).

(96) *Leeds & Hanley Theatres of Varieties* [1902] 2 Ch. 809; *Gluckstein v. Barnes* [1900] A.C. 240.

(97) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* (supra).

(98) *Burton v. Hutchinson* [1849] 2 Car. & Kir. 712.

(99) *English & Colonial Produce Co.* [1906] 2 Ch. 435.

(1) *Melhado v. Porto Alegre Ry. Co.* [1874] L.R. 9 C.P. 503.

(2) *Englefield Colliery Co.* [1878] 8 Ch. D. 388.

(3) *Croskey v. Bank of Wales* [1863] 4 Giff. 314.

partly after its incorporation, but no money value was laid on the services rendered by the promoter to the company or on the property transferred by the former to the latter and the value of the services and the property was not correlated to the nominal value of the shares allotted, it was *held* in a very recent case, that the allotment was *ultra vires* the company in that it involved an unauthorized issue of shares at a discount, and that consequently the allotment was invalid (4). In the last cited case it was further held that the company was entitled to recover 1500 l. from another promoter who had been paid the amount as a refund of the money which he had expended in connection with the formation of the company and the assignment of the vendor's property (concessions) to the company, because the amount was paid only by the *de facto* directors and without authority from the plaintiff company. It was further held that the claim was not statute-barred, because the said promoter was in the position of an express trustee and not a constructive trustee (4). Directors may be made personally liable for sums improperly paid to promoters (5).

**388. Promoter's right of indemnity :—**A promoter however has no right of indemnity against the company in respect of any obligation undertaken on its behalf before its incorporation, stipulating that he shall be paid a certain sum as the preliminary expenses (1). Thus in spite of such a provision, the solicitor who prepares a memorandum or articles of association cannot sue the company for his costs for doing so (6), and the promoter or his solicitor who has paid the fees on registering the company cannot recover them from the company (7). Nor is the promoter or any person employed by him entitled to sue the company in respect of any payment for services rendered or expenses incurred before its incorporation, unless after incorporation it expressly agrees with him to make such payment or from other facts the Court can infer a new contract to reimburse him (8); for a company cannot ratify an agreement purporting to have been made on its behalf before its incorporation (9), and its acts cannot be evidence of a "new agreement" to re-imburse the promoter if they can be shown to have been made with reference to the obligations of the company to indemnify a third person (10). Nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to incorporation (11). Whether there is a fresh contract between the company and the promoters after incorporation is a question of fact (12). See notes to s. 543.

**389. Directors' liability :—**If the directors of a company agree to publish false statements of the company under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished (13). A gift of shares by a promoter to a director must be accounted for by the director to the company, and the company has the option of claiming the thing given or its highest value when held by the director (14). In the case noted below (15) it was held under its circumstances that a certain director was not liable to account for profits in respect of

(4) *Lintin Exploration Syndicate v. Sandys* [1947] 177. L.J. (Ch.) 412.

(5) *Anglo-French Co-operative Society* [1882] 21 Ch. D. 492.

(6) *English & Colonial Produce Co.* (supra).

(7) *National Motor Mail Coarch Co., Clinton's Claim* [1908] 2 Ch. 515 (C.A.).

(8) *Empress Engineering Co.* [1880] 16 Ch. D. 125.

(9) *Natal Land &c. Co. v. Pauline Colliery Syndicate* [1904] A.C. 120 (P.C.), but see notes to s. 34 *ante*.

(10) *Rotherham Alum &c. Co.* [1883] 25 Ch. D. 103.

(11) *English & Colonial Produce Co.* (supra).

(12) *Browning v. Great Central Mining Co* [1860] 5 H. & N. 856.

(13) *Burns v. Pennell* [1849] 2 H. L. C. 496.

(14) *Eden v. Ridsdale Ry. Lamp Co.* [1880] 23 Q.B.D. 308, (C.A.).

(15) *Albion Steel & Wire Co. v. Martin* [1875] 1 Ch. D. 580.

contracts prior to the incorporation of the company, but only for those after that date. See notes to s. 543.

To escape liability under this section it is incumbent upon the directors to establish that the statement complained of was a correct and fair representation of what actually transpired (16).

The liability of a promoter or director may also be enforced in a winding up proceeding (17).

**390. Remedy of aggrieved shareholder :—**To obtain damages from the directors or promoters an aggrieved shareholder may bring an action after the company has gone into liquidation ; but he must show that he has suffered damages, for "fraud without damage or damages without fraud will not found an action" (18). The Court will however direct an inquiry as to damages upon proof of the falsity of material statements (19). But a person who has been induced to apply for shares by fraudulent misrepresentation contained in the prospectus, is not entitled after winding up of the company, to rescind his contract to take shares, even if the assets in the hands of the liquidators are sufficient to pay in full the whole liabilities of the company together with the costs of the winding up (20). If the company failed within a short time after the issue of the prospectus, that will be taken as *prima facie* evidence that the shares were not worth par (21).

If a person who makes a false statement entertains a *bona fide* belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reason. If he had formed no belief whether the statement was true or false and made it recklessly without caring whether it was true or false, an action of deceit will lie against him. But not so, if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved (22).

**391. Liability is joint and several :—**Promoters are jointly and severally liable in respect of secret profits (23). When two co-promoters join in the issue of a prospectus inviting subscription for shares with knowledge that a statement contained in that prospectus is untrue and damages are recovered by a person induced to take shares by that statement against one of them, he is entitled to contribution from the other (24) under this section.

**392. Position of co-promoters :—**Co-promoters are not partners, nor is one promoter necessarily the agent of the others or the act and admission of one evidence against the others (25). The death of a promoter does not release his estate from obligations he has undertaken to find capital (26), nor from liability in respect of breach of fiduciary duties or moneys secretly received and retained by him (27).

In the absence of an express contract one of several promoters cannot sue another for remuneration for his promoting services (28), but a person assisting promoters

(16) *Manavedan v. Amirchand* [1944] M. 431, 57 M.L.W. 312.

(17) *Pearson's case* [1877] 5 Ch. D. 336 (C.A.).

(18) *Pasley v. Freeman* 2 Sm. L. C. 71 ; *Maclean v. Tait* [1906] A.C. 24 (26).

(19) *McConnell v. Wright* [1903] 1 Ch. 546.

(20) *Hull & County Bank* [1880] 15 Ch. D. 507.

(21) Per Lord Lindley in *Shepherd v. Broome* [1904] A.C. 342.

(22) *Angus v. Clifford* [1891] 2 Ch. 449.

(23) *Gluckstein v. Barnes* [1900] A.C. 240.

(24) *Gerson v. Simpson* [1903] 2 K. B. 197.

(25) See Lindley on Companies 6th ed. p. 194 and *Reynell v. Lewis* [1846] 15 M. & W. 517 ; *Maddick v. Marshall* [1864] 16 C. B. (N.S.) 387.

(26) *Re Worthington, ex. parte Pathe Freres* [1914] 2 K.B. 299.

(27) *Concha v. Murreitta* [1889] 40 Ch. D. 543.

(28) *Holmes v. Higgins* [1822] 1 B. & C. 74.

can sue for remuneration for his services, if there is a contract to pay them (29). Promoters are not, as such, agents or liable for the acts of each other; but an authority to act for each other may be inferred from the terms of a public prospectus or from contract (30).

**393. When a person is not promoter. Company's right of rescission :—**A man is not necessarily a promoter because at the time he acquires property he contemplates that at some future time he may form a company to purchase the property (31), and if he does not become a promoter until after the acquisition, his only duty is to see that the amount of his profit is known to the purchasing company; otherwise the company may rescind the contract (32). But if he has disclosed that he is making a profit and fails to make known the amount, rescission is the only remedy for the company (31). If that has become impossible, the profit cannot be recovered nor damages had (31).

If the purchase is not completed by conveyance of the property, rescission may be had, whether the misrepresentation was made fraudulently or innocently (33); but where the purchase has been completed, rescission can only be ordered when fraud is established (34).

If at the time of acquiring the property the vendor was also a promoter, the company can either rescind the contract or retain it reducing the purchase money to the amount the promoter actually spent upon the purchase in relation to the property (35).

**394. Remedy against vendors :—**If the company cannot restore the property in the same state as that in which it was bought, there is no remedy against the vendors except by an action for deceit (36). Lindley, M. R. said: "Fraud may exclude the operation of the principle that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position" (37).

**395. Distinction between motive and intent :—**In considering whether a statement is misleading, the prospectus must be considered as a whole, and if its tendency is to deceive, there is no need to point out some one or more statements which are absolutely false (38). The motive with which the statement is made is immaterial, for a man is liable for a false statement knowingly made, even if he had no intent to defraud (39). "If with intent to lead the plaintiff to act upon it they put forth a statement which they knew may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other" ((40).

**396. Construction of prospectus :—**The Court ought to consider whether the prospectus taken as a whole was not such that it conveyed a meaning which

(29) *Mant v. Smith* [1859] 4 H. & N. 324.

(30) *McEwan v. Campbell* [1857] 2 Macq. 499.

(31) *Lady Forest Gold Mine* [1901] 1 Ch. 582.

(32) *Ladywell Mining Co. v. Brookes* [1887] 35 Ch. D. 400.

(33) *Redgrave v. Hurd* [1881] 20 Ch. D. 1; *New Biggin v. Adam* [1887] 34 Ch. D. 582.

(34) *Seddon v. North Eastern Salt Ltd.* [1905] 1 Ch. 326.

(35) *Glukstein v. Barnes* (supra).

(36) *Sheffield Nickel & Co. v. Unwin* [1877] 2 Q.B.D. 214.

(37) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392 at p. 428.

(38) *Smith v. Chadwick* [1884] 20 Ch. D. 27, on appeal 9 App. Cas. 187.

(39) *Derry v. Peek* [1889] 14 App. Cas. 337; *Smith v. Chadwick* (supra) at p. 201.

(40) *Smith v. Chadwick* (supra) at p. 201.

amounted to a misstatement of fact (41). Lord Lindley said (42): "If a man uses language which taken in its natural sense conveys a wrong impression, he can not be heard to say he did not intend to deceive." A man is answerable for what any one might reasonably suppose to be the meaning of the words he has used (43). But the plaintiff must prove that he understood the statement in the sense in which it is false (44). The prospectus is read as a whole and "people cannot be expected," as pointed out by Lord Halsbury L. C. "to analyze their own mental sensation so minutely as to be able to explain what particular statement had induced them to become subscriber" (45).

**397. What is a false statement:—**A general commendation however is not a false statement even if too highly coloured; but to say that something is expected when in reality it is not, or that the directors have an intention to do something when they have not, is a misstatement of fact (46). A statement that property has been acquired, which has not in fact then been acquired, will be a ground for an action against directors, even if the property is acquired a few days after the allotment of shares (47). Where the words used in a prospectus were that "economical prices would be charged by the Cochin Government" for timber supplied to the company, it was held that if the arrangement was that reasonable prices would be charged, the description was not misleading or false, much less that it was fraudulent (48).

**398. Representation need not be direct:—**It is not necessary that the representation should be direct to the person injured. It is sufficient if it be made to some one with the intent that it shall be repeated to and acted upon by the person who is subsequently injured (49).

**399. Misrepresentation must be one of fact:—**A misrepresentation, to entitle an allottee to relief, must be one of fact (50). Where it was stated that more than one half of the first issue of shares had already been subscribed for when in fact such subscription was a sham one, this was held to be a misrepresentation entitling the applicant to rescission (51). This too was held in the following cases:— where it was falsely stated that the surplus assets as appearing by the last balance-sheet amounted to upwards of 10,000; where it was falsely stated that a particular mine was in full operation and making large daily returns (52); where it was falsely represented that the patented articles were a commercial success (53) beyond the experimental stage (54); where a promoter who was to get a part of the purchase money was untruefully put forward as one of the vendors (55); where it was stated untruefully that the vendor was to pay all the preliminary expenses (56); where it was

(41) *Bentley & Co. v. Black* [1893] 9 T.L.R. 580.

(42) *Arnison v. Smith* [1889] 41 Ch. D. 348 at p. 372.

(43) *Per Cotton L. J.* in *Arkright v. Newbold* [1881] 17 Ch. D. 301 at p. 322.

(44) *Smith v. Chadwick* [1884] 20 Ch. D. 27, on appeal 9 App. Cas. 187.

(45) *Macleay v. Tait* [1906] A.C. 24 at p. 26.

(46) *Karberg's case* [1892] 3 Ch. 1 at p. 11.

(47) *Mc Connel v. Wright* [1903] 1 Ch. 546.

(48) *Manavedan v. Amirchand* [1944] M. 431, 57 M.L.W. 512.

(49) *Andrews v. Mockford* [1896] 1 Q.B. 372.

(50) *Eaglesfield v. Londonderry* [1877] 4 Ch. D. 693 at p. 702.

(51) *Ross v. Estates Investment Co.* [1868] 3 Ch. App. 682; *Kent v. Freehold Land Co.* [1868] 3 Ch. App. 493. In this case it was held that a member could get relief after presentation of a winding-up petition.

(52) *Rees River Silver Mining Co. v. Smith* [1869] 4 H.L. 64; see also *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392.

(53) *Stirling v. Passburg Grains Syndicate* [1891] 8 T. L. R. 71.

(54) *Greenwood v. Leathershod Wheel Co.* [1900] 1 Ch. 421.

(55) *Capel & Co. v. Sims S. C. Co.* [1888] 57 L. J. Ch. 713.

(56) *Re Liberian Govt. Concessions Co.* [1892] 9 T. L. R. 136.

stated untruly that the company was the sole manufacturer of asbestos in France and had a practical monopoly (57); where it was stated that no promotion money was to be paid, while a large sum was to be paid in this way (58).

**400. What is fact :—**The statement that something will be done is not a statement of an existing fact (59); but a representation of belief, opinion, expectation or intention is a representation of fact, for "the statement of a man's mind is as much a matter of fact as the state of his digestion", as observed by Lord Justice Bowen (60). "It is often fallaciously assumed," said the same eminent Judge, "that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is, in a sense, a statement of fact, about the condition of his own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justifies his opinion" (61). There is no safety in ambiguous statements which in one sense are true, but in another sense are not true "which keep the word of promise to the ear and break it to the hope," for the rule is that the applicant is entitled to put any reasonable construction on such a statement and if according to that construction it is untrue, he is entitled to relief (62). But anticipation of results has been held not to be a fact (63). In the last cited case at p. 581 Lord Esher, M. R. said: "At the utmost it came to this—that the directors calculated there would be certain profits. But anticipation of future results was not a statement of fact."

**401. Report of expert :—**If the prospectus is based upon the report of an expert which contains false statements of fact, a person who applied for shares relying on the report may rescind the contract, unless the directors had clearly warned the public that they did not vouch for the accuracy of the report (64). Concealment in a prospectus may amount to fraud (65).

For meaning of "expert", see sub-s. (2) of s. 59.

The speeches of a chairman of directors at a meeting of the company or reports issued to shareholders or furnished by agents of the directors are not however evidence against the company (66).

**402. What is material statement :—**A statement in a prospectus as to the persons who are to be directors is a material statement, and if untrue, a person subscribing on the faith of it is *prima facie* entitled to rescind (67). So, if before

(57) *Hyde v. New Asbestos Co.* [1891] 8 T. L. R. 121.

(58) *Lodwick v. Earl of Perth* [1884] 1 T. L. R. 76.

(59) *Beattie v. Ebury* [1872] 7 Ch. App. 777 at p. 804; *Bellairs v. Tucker* [1884] 13 Q. B. D. 562.

(60) *Edgington v. Fitzmaurice* [1885] 29 Ch. D. 459 at p. 483.

(61) *Smith v. Land & House Property Corpn.* [1884] 28 Ch. D. 7 at p. 15. See also *Bisset v. Wilkinson* [1927] A. C. 177 at pp. 181-182 cited under s. 63.

(62) *Hallows v. Fernie* [1868] 3 Ch. App. 467 at p. 476; *Arkwright v. Newbold* [1881] 17 Ch. D. 301; *Smith v. Chadwick* [1884] 4 App. Cas. 187 at p. 195.

(63) *Bentley & Co. v. Black* [1899] 9 T. L. R. 580.

(64) *Mair v. Rio Grande Rubber Estate* [1913] A. C. 853 at p. 872; *Pacaya Rubber & Co. Co.* [1914] 1 Ch. 542.

(65) See *Christenville Rubber Estates* [1911] W. N. 216, 28 T. L. R. 38; *Shepherd v. Broome* [1903] A. C. 342; *Pacaya Rubber & Produce Co.* [1914] 1 Ch. 542; *Mair v. Rio Grande Rubber Estates* [1913] A. C. 853.

(66) *Devala P. Gold Mining Co.* [1888] 22 Ch. D. 593; *Djambi Rubber Estates* [1812] W. N. 192, *affd.* on appeal 29 T. L. R. 28.

(67) *Scottish Petroleum Co.* [1888] 23 Ch. D. 413; *Kent Country Gas Co.* [1913] 1 Ch. 92.



the allotment some of the directors mentioned in the prospectus retire and the fact of retirement is not communicated to the allottee, he would be entitled to rescind the contract and claim a refund of the money paid by him (68). It is misrepresentation to state in a prospectus that share capital has been "subscribed" when it has only been allotted in fully paid up shares (69), or that the company has contracted for purchase of a property, when in fact there is negotiation only (70).

**403. What is "untrue statement" :—**A misleading statement in a prospectus is an "untrue" statement and the liability imposed by the section is absolute. Persons issuing such statements can only escape liability under the statute by proving that they had "reasonable ground" for believing and did in fact believe the statement to be true. The Court will refuse to give effect, as against a shareholder, to a tricky waiver clause in a prospectus or application form (71). "I quite agree in this", observed Lord Blackburn, "that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induces them to enter into the contract, that is down right fraud. . . . I further agree in this, that when a statement or representation has been made in the *bona fide* belief that it is true, and the party who has made it afterwards come to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge thereby allowing the other party to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in; that would be fraud too. . . . And I go on further still to say what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also" (72).

A misstatement of intention is misstatement of fact, and if the allottee was misled by it, an action of deceit may be founded on it. Where an allottee has been induced to take shares or debentures both by his own mistake and by a material misstatement by the directors, and the former receives injury thereby, the latter may be liable in an action for deceit (73).

**404. Notice :—**The provisions in the articles or in Table A apply only to notices relating to the ordinary business of the company, and service in the way there pointed out is not sufficient for the purpose of fixing a shareholder with knowledge of a misrepresentation which would entitle him to repudiate his shares, unless he had been guilty of laches after notice of the misrepresentation (74).

If the prospectus states the effect or terms of a document and offers it for inspection, the intending subscriber is not bound to inspect it. Jessel, M. R. observes : "When men issue a prospectus in which they make statements of the contracts made before the formation of the company, and state that the contracts may be inspected at the office of the solicitors, it has always been held that those who accepted these false statements as true, were not deprived of the remedy because they neglected to

(68) Venkataramayya v. Industrial Bank [1930] M. 325, 124 I. C. 193.

(69) Arnison v. Smith [1889] 40 Ch. D. 567.

(70) Ross v. Estates Investment Co. [1868] 3 Ch. App. 682.

(71) Greenwood v. Leathershod Wheel Co. (supra).

(72) Brownlie v. Campbell [1880] 5 App. Cas. 925, 950.

(73) Edgington v. Fitzmaurice [1885] 29 Ch. D. 459.

(74) London & Staffordshire Fire Insurance Co. [1883] 24 Ch. D. 119.

go and look at the contracts" (75). "It was argued for the company", said Lord Watson, "that inasmuch as the contracts for the purchase of the concession were generally referred to towards the end of the prospectus, the respondent must be held to have notice of their contents. This appears to be one of the most audacious pleas that ever was put forward in answer to a charge of fraudulent misrepresentation. When analysed it means simply that a person who has induced another to act upon a statement made with intent to deceive must be relieved from the consequences of his deceit, if he has given his victim constructive notice of a document the perusal of which would expose fraud" (76).

**405. Non-disclosure :—**In the case of non-disclosure however, says Eve J., "there must be something more than mere non disclosure proved before misrepresentation is established ; it must, I think, be shown that the non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus" (77).

An underwriter who takes shares relying on the names of the directors cannot obtain rescission on the ground of defects in the prospectus (78) ; but it is not necessary for him to show that the statement complained of was fraudulently made or was known to the directors to be untrue (79).

**406. Effect of director's omission and adoption :—**A director who was aware that a prospectus was being issued to the public, but did not trouble to read it, abstained from inquiry as to its contents and gave no notice under the Act, is responsible for the contents of the prospectus (80) ; and a director who subsequently adopted a prospectus he had not originally approved was also held liable (81).

**407. Their duty :—**If the directors discover a mistake in the prospectus, it is their duty to point it out in unambiguous terms, and not merely to send a new prospectus correctly stating the facts (82). As to the measure of damages, see the cases noted below (83).

If the misstatement is due to a mistake of law, the fact that the directors took the opinion of counsel will not protect them (84).

Where the directors make a statement to existing shareholders, they have a higher duty to such shareholders than to the general public and may come under liability for dereliction of that duty in a case falling short of actual fraud (85).

**408. Who can sue :—**Those persons who buy in the market cannot, as a general rule, sue under this section, nor will false report made by directors to a general meeting entitle a person who buys shares on the faith of it *from a shareholder* to rescind his contract (86). But this rule does not apply where it is shown that the prospectus was intended and used to induce purchasers in the market to buy the shares (87). Where however a person applied for shares on looking at a proof pros-

(75) *Redgrave v. Hurd* [1881] 20 Ch. D. 1 at p. 14 ; see also *Smith v. Chadwick* [1884] 9 App. Cas. 187, 20 Ch. D. 27.

(76) *Aaron's Reefs v. Twiss* [1896] A. C. 273 at p. 287.

(77) *Christenville Rubber Estates* (supra).

(78) *Batey v. Keswick* [1901] W. N. 167, 85 L. T. 18.

(79) *Redgrave v. Hurd* (supra) ; *Karberg's case* [1892] 3 Ch. 1 at p. 13 ; *Lagunas Nitrate Syndicate* [1899] 2 Ch. 392 at p. 423.

(80) *Drincqbier v. Wood* [1887] 37 Ch. D. 541 at p. 569.

(81) *Peck v. Derry* [1887] 37 Ch. D. 541 at p. 569.

(82) *Arnison v. Smith* [1889] 41 Ch. D. 348.

(83) *Ibid* p. 363 ; *Peck v. Derry* (supra) ; *Twycross v. Grant* [1877] 2 C. P. D. 469.

(84) Per Lord Lindley in *Shepherd v. Broome* [1904] A. C. 342.

(85) *Nocton v. Ashburton* [1914] A. C. 932 at p. 955.

(86) *Peck v. Gurney* [1873] 6 H. L. 377.

(87) *Andrews v. Mockford* [1896] 1 Q. B. 372.

pectus which was subsequently issued, it was held that he could not sue for loss sustained by reason of the statements alleged to be untrue, as he had agreed to underwrite the shares before the issue of the prospectus (88).

If one prospectus fulfils the statutory conditions, but another does not, only those who subscribed on the latter are entitled to relief (89).

**409. Joinder of parties:—**A number of persons who subscribe on the faith of the same prospectus may join as plaintiffs in one action; but each must prove separately that he was induced to take the shares by the untrue statements in the prospectus (90). Claims for rescission against the company and damages against the directors may also be included in one action (91).

**410. Contribution:—**A director who has paid damages for loss arising out of misrepresentation in the prospectus can recover contribution from co-directors who might have been liable in the first instance (92). Where the directors know that one of their body is obtaining subscription for the shares, the company is responsible for representations made by him (93).

**411. *Actio personalis &c.*—**The principle *actio personalis moritur cum persona* applies where no property, proceeds or value of property have been received by the deceased director and added to his estate (94). Where a person who has taken shares on the faith of a fraudulent prospectus dies, his executors however can commence or continue an action for the loss suffered by his estate (95); but where the director or promoter charged dies, executors cannot be sued unless his estate has benefited by the fraud (96), and the action will fail unless a complete judgment has been obtained for an ascertained amount before the defendant's death (97).

**412. Criminal liability of director:—**Directors may be convicted for the conspiracy by inducing persons to subscribe for shares or debentures by fraudulent statements (98). Statements made to the directors by the vendors or promoters do not alone afford reasonable grounds for believing the truth of the matter stated (99). If the statement complained of is contained in a report set out in the prospectus, the company is responsible if the report was fraudulent on the part of the company's agent (1).

If the directors agree to publish false statements of the affairs of the company under such circumstances as to show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished (2).

The directors of a new company had conspired to deceive the members of the committee of the Stock Exchange and to induce them, contrary to the intent of certain of their rules, to order a quotation of the shares of the company in the

(88) *Dyster, Nalder & Co v Leaven* [1915] 140 L. T. Jo. 50.

(89) *Rousell v. Burnham* [1909] 1 Ch. 127.

(90) *Amison v. Smith* [1889] 41 Ch. D. 348.

(91) *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504.

(92) *Gerson v. Simpson* [1903] 2 K. B. 197 (C. A.).

(93) *Hilo Manufacturing Co. v. Williamson* [1911] 28 T. L. R. 164 (C. A.).

(94) *Geipel v. Peach* [1817] 2 Ch. 108.

(95) *Twycross v. Grant*, No. 2 [1879] 4 C. P. D. 40.

(96) *Peek v. Gurney* (supra).

(97) *Phillips v. Homfray* [1883] 24 Ch. D. 439; see also *Davoren v. Woolton* [1900] 1 I. R. 273.

(98) *Queen v. Aspinall* [1876] 2 Q. B. D. 48 (C. A.).  
1 I. R. 273.

(99) *Adams v. Thrift* [1915] 1 Ch. 557, affirmed by C. A. in [1915] 2 Ch. 21.

(1) *Mair v. Rio Grande Rubber Estate* [1913] A. C. 853.

(2) *Burnes v. Pennell* [1849] 2 H. L. C. 496.

official list of the Stock Exchange and thereby to induce members of the public to believe that the said company had complied with the said rules so as to entitle it to have shares quoted in the official list of the Stock Exchange : *held*, the averments, if proved, sufficiently supported the charge of criminal conspiracy (3).

As regards the criminal liability for misstatement in a prospectus, see the new provision in the next section.

**413. Effect of misreading prospectus :—**Where a person applies for shares on the misreading of the prospectus and not on the faith of its representation, he is not entitled to resile from the contract (4). A person, who before the registration of a company applies for shares on the faith of a prospectus, ought to be treated as having become aware of any variations between the prospectus and the memorandum of association at the earliest possible opportunity (5).

**414. Limitation :—**A suit for damages by a shareholder against the directors on the ground of false representations in the prospectus is governed by Art. 36 and not by Art. 120 of the Limitation Act, the wrong complained of being entirely independent of contract (6).

**415. Knowingly issuing :—**Where a director issued a prospectus which did not disclose a material contract, he knowingly issued the prospectus where he had a general knowledge of the existence of the contracts which might fall within s. 93, sub-s. (1), cl. (b) of the old Act and he made no enquiries into these contracts, but relied upon the assurance of the company's solicitor that the prospectus disclosed all such contracts (7). As to the meaning of the words "knowingly issued," see the judgment of Romer, L. J. in *Tait v. Macleay* [1904] 1 Ch. 631 at pp. 638 to 640.

**416. Remedy of an aggrieved party :—**The mere fact of non-compliance with s. 56 does not entitle a person, who has taken shares on the faith of the prospectus, to have a rescission or rectification of the register. His remedy is in damages against those who are responsible for the prospectus (8).

**63. Criminal liability for mis-statements in prospectus.—**(1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

(2) A person shall not be deemed for the purposes of this

(3) *Reg. v. Aspinall* [1876] 36 L. T. 297.

(4) *Bansidhar v. Tata Power Co.* [1925] B. 272, 27 Bom. L. R. 330, 87 I. C. 547.

(5) *Peel's case* [1867] 2 Ch. App. 674.

(6) *Manavedan v. Amirchand* [1944] M. 431, 57 M. L. W. 312.

(7) *Tait v. Macleay* [1904] 2 Ch. 631 : see also *J. & P. Coates, Ltd. v. Crossland* [1904] 20 T.L.R. 800 at p. 807.

(8) *Wimbledon Olympia Ltd.* [1910] 1 Ch. 630 ; *South of England Natural Gas Co* [1911] 1 Ch. 573

section to have authorised the issue of a prospectus by reason only of his having given—

(a) the consent required by section 58 to the inclusion therein of a statement purporting to be made by him as an expert, or

(b) the consent required by clause (b) of sub-section (3) of section 60.

This section is new and is based on s. 98 of the C.L.C.'s redraft and s. 44 of the English Act of 1948. No changes of substance have been made—*Notes on Clauses.*

In this section the burden of proving innocence has been placed upon the accused.

**64. Document containing offer of shares or debentures for sale to be deemed prospectus.**—(1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company ; and all enactments and rules of law as to the contents of prospectuses and as to liability in respect of statements in and omissions from prospectuses, or otherwise relating to prospectuses, shall apply with the modifications specified in sub-sections (3), (4) and (5), and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot ; or

(b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the shares or debentures had not been received by it.

(3) Section 56 as applied by this section shall have effect as if it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates ; and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Section 60 as applied by this section shall have effect as if the persons making the offer were persons named in a prospectus as directors of a company.

(5) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (1) is signed on behalf of the company or firm by two directors of the company or by not less than one-half of the partners in the firm, as the case may be ; and any such director or partner may sign by his agent authorised in writing.

This section corresponds to s. 98A of the previous Act. See s. 100 of the C.L.C.'s redraft and s. 45 of the English Act of 1948.—*Notes on Clauses.*

In sub-s. (5) the words "in the firm" before "as the case may be" have been inserted by the Joint Committee.

**65. Interpretation of provisions relating to prospectuses.**—(1) For the purposes of the foregoing provisions of this Part—

(a) a statement included in a prospectus shall be deemed to be untrue, if the statement is misleading in the form and context in which it is included ; and

(b) where the omission from a prospectus of any matter is calculated to mislead, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included.

(2) For the purposes of sections 61, 62 and 63 and clause (a) of sub-section (1) of this section, the expression "included" when used with reference to a prospectus, means included in the prospectus itself or contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

This section is new and is based on s. 101 of the C.L.C.'s redraft and s. 46 of the English Act of 1948.—*Notes on Clauses.*

**66. Newspaper advertisements of prospectus.**—Where any prospectus is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, or the number of shares subscribed for by them.

This section corresponds to sub-s. (2) of s. 93 of the old Act. It is based on s. 101F of the C.L.C.'s redraft. There is no similar provision in the English Act—*Notes on Clauses*.

*Clause 60 of the original Bill has been deleted by the Joint Committee with the following observation:—“This clause has been omitted from the Bill in view of the Securities Contracts (Regulation) Bill, 1954, recently introduced in the Lok Sabha (Bill No. 65 of 1954) which provides for the regulation for stock exchanges and the licensing of dealers in securities (vide J.C.R., para 27).*

**67. Construction of references to offering shares or debentures to the public etc.**—(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances—

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation ; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

(4) Without prejudice to the generality of sub-section (3), a provision in a company's articles prohibiting invitations to

the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded in the manner set forth in that sub-section.

(5) The provisions of this Act relating to private companies shall be construed in accordance with the provisions contained in sub-sections (1) to (4).

This section is new and corresponds to s. 55 of the English Act of 1948. It is based on the following recommendation of the C.L.C. : "One of the methods by which savings are attracted from the public is through 'placings' by a broker's or issuing office or investing syndicates. While it will be hard to provide statutorily that every placing must be deemed to be an offer for sale, such placings as are to all intents and purposes 'offers to the public' should be brought indisputably within the provision of the Act (*vide* recommendations of the Cohen Committee). The object of this section is to cover such placings" (pp. 298-99 of the C. L. C. R.).

An endeavour has been made to simplify the drafting of the clause so as to bring out the meaning quite clearly—*Notes on Clauses*.

Some verbal changes have been made in this section by the Joint Committee.

**68. Penalty for fraudulently inducing persons to invest money.**—Any person who, either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into—

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting shares or debentures ; or

(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures ;

shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten thousand rupees, or with both.

This section is new and is based on s. 99 of the C.L.C.'s redraft. Only a few drafting improvements have been effected. This section corresponds to s. 12 of the British Prevention of Fraud (Investment) Act, 1939 (2 and 3 Geo. 6, Chap. 16)—*Notes on Clauses*. Sub-cl. (2) of the original clause (62) has been omitted by the Joint Committee, as in their view it will be sufficiently covered by the relevant provisions of the Indian Penal Code (*vide* J.C.R., para 28).

### Allotment

**69. Prohibition of allotment unless minimum subscription received.**—(1) No allotment shall be made of any share capital of a company offered to the public for subscrip-



tion, unless the amount stated in the prospectus as the minimum amount which, in the opinion of the Board of directors, must be raised by the issue of share capital in order to provide for the matters specified in clause 5 of Schedule II has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company, whether in cash or by a cheque or other instrument which has been paid.

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in money, and is in this Act referred to as "the minimum subscription".

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) All moneys received from applicants for shares shall be deposited and kept deposited in a Scheduled Bank until they are returned in accordance with the provisions of sub-section (5) or until the certificate to commence business is obtained under section 149.

In the event of any contravention of the provisions of this sub-section, every promoter, director or other person who is knowingly responsible for such contravention shall be punishable with fine which may extend to five thousand rupees.

(5) If the conditions aforesaid have not been complied with on the expiry of one hundred and twenty days after the first issue of the prospectus, all moneys received from applicants for shares shall be forthwith repaid to them without interest ; and if any such money is not so repaid within one hundred and thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of six per cent. per annum from the expiry of the one hundred and thirtieth day :

Provided that a director shall not be so liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(6) Any condition purporting to require or bind any applicant for shares to waive compliance with any requirement of this section shall be void,

(7) This section, except sub-section (3) thereof, shall not apply in relation to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

This section corresponds to s. 101 of the previous Act. It is based on s. 101A of the C.L.C.'s redraft and s. 47 of the English Act of 1948. Sub-s. (8) of s. 101A of the aforesaid redraft has been embodied in a separate paragraph of sub-s. (4) of this section—*Notes on Clauses*.

Certain alterations have been made in this section by the Joint Committee with the following observations :—"In order to cover all kinds of instruments by means of which payments may be made, the words 'or by other instrument' " have been added after the word 'cheque' in sub-clause (1).

"The period provided in this clause for repayment by the Company of the moneys to the applicants for shares has been increased from 90 to 120 days. As a consequential change, the period on the expiry of which the liability of the directors to repay the moneys will arise has been extended from 100 to 130 days. On the other hand, the rate of interest fixed under the clause has been raised from 5 to 6 per cent." (*Vide J.C.R., para 29*).

**Scope** :—The provisions of this section relating to the conditions of applications for and allotment of shares apply only to public companies and not to private companies (9).

**Applications** :—Sub-s. (1) of s. 101 of the previous Act, clearly showed that the entire section with all sub-sections applied only to public companies. Sub-s. (8) of that section was only intended to clear a possible ambiguity earned by the phrasing of sub-s. (7) of s. 101 (9).

**417. Contract to take share** :—A contract to take shares in a company is generally constituted by an application and an allotment notified (10) to the applicant the application being an offer and the allotment being its acceptance. "The course of decisions has determined that to obtain a binding allotment, there must be application, an allotment and a communication of that allotment (11). A binding contract is not made until the acceptance is notified to the applicant (12). If the notice of allotment is sent by post, the acceptance is deemed to be notified when the notice is posted, even though it never reaches the applicant (13), provided the offer is one which can be accepted by a letter sent through post (14). An allottee will not be constituted a member unless he has notice of the fact of allotment. A formal notice is however, not necessary if he is made aware of the fact (15). The mere entry of his name on the register of members is not sufficient for the purpose (15). Where allotment was made long after the application, and notice of allotment was said to have been sent just before the company went into liquidation, and it was not shown when the name of the applicant was put on the register of members, it was held that the applicant was not a member of the company (16).

(9) *Lakshmi Narasa v. Official Receiver* [1951] 1 M.L.J. 488, [1951] M. 870. [1951] M.W.N. 246.

(10) *Pellat's case* [1867] 2 Ch. App. 527, 535; *Grissell's case* [1866] 1 Ch. App. 528.

(11) *Per Lord Justice Page-Wood in Universal Banking Co., Roger's case* [1868] 3 Ch. App. 633 (637), 41 L.T. 298; see also *Mohan Lal v. S. G. Cotton Mills* [1900] 4 C.W.N. 369.

(12) *Nicol's case* [1885] 29 Ch. D. 421; *Pellat's case* (supra).

(13) *Harris's case* [1872] 7 Ch. App. 587.

(14) *Household Fire Insurance Co. v. Grant* [1879] 4 Ex. D. 216 (C.A.); *Henthorn v. Fraser* [1892] 2 Ch. 27 at p. 33; *Bruner v. Moore* [1904] 1 Ch. 305 at p. 316.

(15) *Gunn's case* [1867] 3 Ch. App. 40.

(16) *Radhe Sham v. Prabh Dayal* [1936] L. 16, 161 I.C. 294.

Allotment should be made within a reasonable time and a person is not bound to accept an allotment made after the lapse of a reasonable time (17). As to the meaning of allotment, see the cases noted below (18).

The Court has jurisdiction to specifically enforce a contract by a person to take and by a company to allot shares (19).

**Executory contract :—**The legal possibility of a valid executory contract for allotment of shares is recognized, provided there is an offer and acceptance. It may be brought into existence in the same manner and subject to the same principles as under the Contract Act. The communication of the acceptance may be verbal or may be inferred by conduct (20).

**Specific performance :—**The Court has jurisdiction to decree specific performance of a contract, either to take shares or to allot shares, subject to the same principles which govern suits for specific performance, as laid down in the Specific Relief Act (20).

**418. Allotment :—**An allotment is none the less an allotment although money paid by the applicant is subsequently returned on its being found that the prospectus contained misleading statements (21). Allotment once made and communicated cannot be cancelled (22), as that would be reducing the capital of the company (23). Alteration of the articles of association between an application for shares and their allotment was held to invalidate the allotment (24).

An allotment of shares must be made within a reasonable time and the allottee is not bound to accept an allotment made after the lapse of a reasonable time. But where the notice of allotment has not been objected to promptly, he will be bound (25).

**419. Allotment and transfer :—**An allotment of shares is an act of the company by which the applicant for shares becomes the holder of unappropriated shares. While shares standing in the name of A cannot be allotted to B even with A's consent, such shares may be *transferred* by A to B, the company's power of interference in respect of such transfer being determined by its articles of association (26).

**420. Notice of allotment :—**Mere posting of a letter of allotment to an applicant at the proper address is not such a communication of the allotment as to bind the applicant. The burden of proof that he received the notice of allotment is on the company (27). But even where there is no formal notice of allotment, the receipt of notice may be implied from the conduct of the allottee (28). Only slight evidence is required as to the service of notice of allotment (29).

**421. Offer and acceptance may be oral :—**The offer or the acceptance may be oral (18). Before notification of the acceptance is received (30), or if sent by post,

(17) *Indian C. & N. Trading Co. v. Padamsey* [1934] B. 97, 36 Bom. L.R. 32, 150 I.C. 457.

(18) *Levita's case* [1867] 3 Ch. App. 36; *Gunn's case* [1867] 3 Ch. App. 40.

(19) *Odessa Tramways Co. v. Mendel* [1878] 8 Ch. D. 235.

(20) *Transport Co. Ltd. v. Tiruneveli M. B. Service Co.* (1955) N. U. C. 3186 (Mad.), (1955) 2 M.L.J. 141.

(21) *Ellet v. Sternberg* [1911] 27 T.L.R. 127.

(22) *Duff's Executor's case* [1886] 32 Ch. D. 301; cf. *Hall's case* [1870] 5 Ch. App. 707.

(23) *Sorabji v. Iswardas* [1886] 20 Bom. 654.

(24) *English & Co. Rolling Stock Co.* [1866] 35 Beav. 646.

(25) *Murugappa v. Pudukottai Ceramics Ltd.* (1955) N.U.C. 2483 (Mad.).

(26) *Mumtaz Bank v. Syed Masud Ali* [1937] L. 812.

(27) *Reedpath's case* [1870] L.R. 11 Eq. 86.

(28) *Richards v. Home Assurance Assn.* [1871] L.R. 6 C.P. 591; *Imperial L. C. Corpn.* [1868] 37 L.J. Ch. 844.

(29) *Sparlings' case* [1877] 26 W.R. 41.

(30) *Ritso's case* [1877] 4 Ch. D. 774; *London & Northern Bank* [1900] 1 Ch. 220.

posted (31), the offer may be withdrawn and repayment of the deposit money claimed (32). Even if the offer is made in writing, it may be withdrawn orally (33). But an withdrawal is effective only when it reaches the company and not at the time of posting (34). An allotment made without application, the allotment money not being paid, is illegal and the directors who made such allotment are guilty of misfeasance (35). They are also guilty of misfeasance if they are party to a calculated and deliberate fraud in the floatation of the company and in the conduct of its business (35).

See N. 290.

**422. Effect of mistake :—**There is no contract however where the offer to take shares is made by a man who believes it to be a totally different company (36).

**423. Conditional allotment :—**An allotment may be made conditionally. In such a case the allottee does not become a member, until the condition is performed, even if his name is (conditionally) registered (37). But where there is a conditional application and an unconditional allotment, there is no contract, as the parties are not *ad idem* (38). Where the application is conditional, the directors are not at liberty to allot unconditionally (39). An allottee may be estopped from contending that the allotment is void on the ground of non-fulfilment of condition, when by his conduct, that is, by accepting the position as shareholder, by accepting dividend, by filing suit for it and by pledging the shares, he has waived the condition (40).

Where a person takes some shares on condition that he would be appointed chairman of the local board of directors, and he is allotted shares and appointed chairman, but subsequently there is a breach of the condition by his dismissal, his remedy is by an action for damages and not for getting his name removed from the register of members (41).

**424. Contract through agent :—**Where an application is made before, but allotment notice is sent after, incorporation of the company, they constitute a complete contract (42). An agent to apply for shares will not necessarily be deemed to have authority to receive notice of allotment (43). In ordinary circumstances the application for shares is a mere proposal which may be withdrawn before acceptance is communicated, communication to the agent through whom the application was made being sufficient (44). But where the authority given by the applicant to a person to apply for shares is a continuing and irrevocable authority coupled with an interest, the former is not entitled to withdraw (45). In the case of underwriting or sub-underwriting the filling up of application form is neither necessary nor appropriate (44).

(31) *Household Fire Insurance Co. v. Grant* [1879] 4 Ex. D. 216 (C.A.); *Henthorn v. Fraser* [1892] 2 Ch. 27 at p. 33; *Bruner v. Moore* [1904] 1 Ch. 305 at p. 316.

(32) *Pentelow's case* [1869] 4 Ch. App. 178; *A. Sirkar v. Parjoar Hosiery Mills* [1933] R. 388, 150 I.C. 696.

(33) *Ritso's case* (supra).

(34) *Henthorn v. Fraser* (supra).

(35) *Indian States Bank v. Sardar Singh* [1934] A. 855, 154 I.C. 33.

(36) *Baillie's case* [1898] 1 Ch. 110.

(37) *Spitzel v. Chinese Corp.* [1899] 80 L.T. 347.

(38) *Roger's case* [1868] 3 Ch. App. 633; *Wood's case* [1873] 15 Ex. 236; *Powell v. S. Sen* [1918] 40 All. 45, 15 A.L.J. 893.

(39) *Ramanbhai v. Ghasiram* [1918] 42 Bom. 595 at p. 600.

(40) *Hargopal v. Peoples Bank of N. India* [1935] L. 691; see also *Piara Singh v. Peshwar Bank* [1915] 28 I.C. 53; *Peoples Bank of N. India* [1936] L. 700.

(41) *Peoples Bank of N. India* (supra).

(42) *Downes v. Ship* [1868] 3 H.L. 343.

(43) *Robinson's case* [1869] 4 Ch. App. 322.

(44) *Per Warrington L. J.* in *Poles's case* [1920] 2 Ch. 341.

(45) *Ibid* (Carmichael's case [1896] 2 Ch. 643 applied).

**425. Withdrawal of proposal:**—S. 6 of the Indian Contract Act IX of 1872 says: "A proposal is revoked—(1) by the communication of notice of revocation by the proposer to the other party; (2) by the lapse of time prescribed in such proposal for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time, without communication of the acceptance." If the proposer revokes, sub-s. (2) applies after the lapse of a reasonable time unless of course the proposer's conduct amounts to a waiver of the revocation (46). Before a person is informed of the allotment, he has a right to revoke his offer and ask for return of the money (47). Where a company allotted shares to A who at the time had not applied for them and who, when he subsequently did apply was unaware of the previous allotment, it was held that the allotment previous to his application was invalid, and that as A had withdrawn his subsequent application, his name must be removed from the register of members (48). Care should be taken that nothing is introduced in a letter of allotment differing from the terms of the prospectus or the application form, for in such a case the applicant may withdraw as there is no completed contract (49). If a new term is introduced the allotment letter is no longer an acceptance, but it is a new offer which must be accepted before there is a contract (50). Thus where a man applied for shares and got an allotment letter marked "not transferable", it was held that there was no contract and the applicant was allowed to repudiate the shares (51).

**426. Contract where binding and where not:**—To allot less than the number of shares applied for does not constitute a binding contract, unless words in the application authorize a partial allotment (52). Where the directors allotted shares on terms which were illegal, e.g., that they should be paid for by fees earned, it was held that there was no contract and the allottee was not a shareholder (53).

An allotment made on an application signed in a false name constitutes a good contract, if the applicant intended to get the benefit of the shares. In such a case he will be put in a winding up on the list of contributories in his true name (54). But it will be otherwise if the application was not intended to be acted upon, as in the case in which the application was sent in order to increase the supposed number of shares applied for (55).

**427. Repudiation:**—The allotment must be made within a reasonable time of the application, otherwise the applicant may repudiate the shares (56). Although a person's name is entered in the register of members, no agreement will be implied by reason only of receiving the notice of allotment, if he forthwith repudiates them (57). Although a person may repudiate the shares on the ground of his receiving no notice of allotment, yet where he executes a transfer of the shares, he would be deemed to have accepted the shares and would be rightly on the list of contributories (58). Where shares were allotted at a meeting of directors irregularly held, but the allotment was confirmed at a subsequent regular meeting, it was

(46) *Ramlal Sao v. Malak* [1939] N. 225, [1939] N.L.J. 305.

(47) *A. Sirkar v. Parjoar Hosiery Mills* [1933] R. 388, 150 I.C. 696.

(48) *Exp. Hall* [1890] 63 L.T. 369.

(49) *Jackson v. Turquand* [1869] 4 H.L. 305.

(50) *Per Cotton L.J. in Hussey v. Horne-Payne* [1878] 8 Ch. D. 670.

(51) *Duke v. Andrews* [1843] 2 Ex. 290.

(52) *Ex Parte Roberts* [1852] 1 Drew. 204.

(53) *National House Property Co. v. Watson* [1908] S.C. 888.

(54) *Savingny's case* [1899] W.N. 1, 5 mans. 336.

(55) *Coventry's case* [1891] 1 Ch. 202.

(56) *Ritso's case* [1877] 8 Ch. D. 774; *Karachi Oil Products Ltd. v. Narendra Singh* (1950) B. 149, 51 Bom. I.R. 1012.

(57) *Austin's case* [1866] I.R. 2 Eq. 435; *Imperial I. C. Corpn.* [1868] 16 W.R. 1191.

(58) *Peruvian Rys. Co.* [1869] 4 Ch. App. 322.

held that although the original allotment was invalid, it had been ratified by the company and was binding on the allottees, and that having regard to the fact that the allottees had not repudiated their shares on the ground of invalidity of allotment, the ratification was made within a reasonable time (59). See notes to s. 56.

**428. Who is to make allotment:**—Unless the articles otherwise provide, the duty of making allotment primarily falls upon the directors and it cannot be delegated to a purely ministerial officer (60). But where the articles do not specifically make such provision and state on the other hand that the general management of the company shall be by the secretaries and treasurers subject to the supervision of the directors, it was held that allotment by the secretaries and treasurers was valid (61). Where the power of allotment is vested by the deed of settlement in the board of directors the quorum of which, is three, they have no right to delegate such powers, e.g., to two directors (62).

**429. Directors' duty in making allotment:**—In making allotment the directors should bear in mind that they are trustees of the company and must allot the shares for its benefit. It is a breach of duty for directors to issue shares to themselves and their friends in more favourable terms than those offered to the public, unless the latter are expressly informed of the arrangement (63). Although the directors are not bound to issue shares at a premium when they are above par in the market (64), they should not allot them at par to members of their own body or their friends, for they should always seek to obtain the benefit of the premium for the company (65). If they make such allotment at par they must account to the company for the profits (65). Directors should not also allot shares to themselves for the purpose of obtaining control of the voting power in the company. If they do so the Court will declare the allotment invalid and rectify the register and in the meantime will restrain the allottees from voting in respect of the shares thus allotted (66). The directors may however purchase shares for the purpose of increasing their voting power (67). An allotment by directors is valid even though they themselves have not paid the allotment money on the shares held by them, and such objection is not open after liquidation (68).

An allotment should be made within a reasonable time, and the applicant is not bound to accept the allotment after the lapse of a reasonable time. A period of 18 months was held to be unreasonable time (69).

Once an allotment is made it is not competent to the company to cancel it. Where it is cancelled after it is communicated to the allottee, it is not competent to the company to pass a second resolution allotting the shares to the shareholder, and the subsequent allotment and non-payment of the money due thereunder cannot be made the foundation of any notice for forfeiture (69).

**430. Remedy in case of irregular allotment:** Allotment of shares by an irregularly constituted board is *prima facie* invalid; but if the articles validate an act done by a *de facto* director in a *bona fide* manner, the Court will uphold the

(59) Portuguese C. G. Mines [1890] 45 Ch. D. 16.

(60) Purala v. Guntur C. J. & P. Mills [1914] 26 L.C. 349, 16 M.L.T. 538.

(61) Ex p. Roberts (supra).

(62) Howard's case [1866] 1 Ch. App. 561.

(63) Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56.

(64) Per Lord Davey in Hilder v. Dexter [1902] A.C. 474 at p. 480.

(65) Shaw v. Holland [1900] 2 Ch. 305.

(66) Punt v. Symons & Co. [1903] 2 Ch. 506; Piercey v. S. Mills & Co. [1920] 1 Ch. 77.

(67) North-West Transportation Co. v. Beatty [1887] 12 App. Cas. 589.

(68) All-India Cattle Insurance Co. [1935] L. 464, 155 J.C. 536.

(69) Karachi Oil Products, Ltd. v. Narendra Singhji [1950] B. 149, 51 Bom. L.R. 1012.

act (70). A person to whom shares have been irregularly allotted has the right to have his name taken off the register of members, but he cannot do so after he has accepted his shares certificate (71). Where an *ultra vires* issue of shares has been made the subscribers are entitled to get back their money (72). But a subscriber, who after having been duly registered as a shareholder has parted for value with the shares by a sale which the company recognized by the issue of share certificate to and registration of the transferee, cannot assert that the shares have not been lawfully issued, much less to assert that there has been, so far as he was concerned, a total failure of consideration (72). The right to rescind an allotment on the ground of fraud and misrepresentation must be exercised at the earliest moment when the allottee becomes aware of them (see the last case). For other cases on this point see notes to s. 155.

**431. Misrepresentation and fraud :—**Where one of the parties to a negotiation induces the other to contract on the faith of representations any one of which has been untrue, the whole contract is to be considered as having been obtained fraudulently; nor is the case varied by the circumstance that the untrue representation was in the first instance the result of innocent error, if after the discovery of the error, the party who made the representation suffer the other to continue in that error (73). Fraud and collusion cannot ordinarily be proved by direct evidence, but has to be gathered from the circumstances (74). The law agent of a company cannot however make representations about the condition of the company, and a person purchasing shares on such representations cannot repudiate the contract on the ground of misrepresentation (75).

**432. Remedies of aggrieved party :—**"In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation is the alleged ground of relief of the party who repudiates the contract, it is of course essential to ascertain whether that which is relied on is a representation of a specific fact, or statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and may have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy : A representation of fact may be inherent in a statement of opinion, and at any rate, the existence of opinion in the person stating it is a question of fact" (76). See notes to s. 62.

Delay in taking proceedings promptly by the shareholder, provided steps are taken within the statutory period, will not disentitle him to relief, so long as the company is a going concern, unless it shows waiver, abandonment and acquiescence or occasions alteration in the position of the other party (77). There is no difference in this respect between an ordinary contract and a contract to take shares in a company, save where liquidation proceedings have intervened (77).

Apart from agreement by which a person becomes a shareholder, when there has been fraud and misrepresentation inducing the contract, the injured party can resist a claim upon the contract made against him by the other party. Accordingly

(70) *Changa Mull v. Provincial Bank* [1914] 36 All. 412, 12 A.L.J. 667; *British Asbestos Co. v. Boyd* [1903] 2 Ch. 439; *British Empire Match Co.* [1848] 49 L.T. 291. See also s. 290.

(71) *Pusarala v. Guntur C. J. & P. Mills* [1914] 26 I.C. 349, 16 M.L.T. 538.

(72) *Margaret Linz v. Electric Wire Co.* [1948] 52 C.W.N. 716 (P.C.).

(73) *Reynell v. Spyre* [1852] 1 De G. M. & G. 660.

(74) *Akshoy v. Ahmad Ali* [1932] C. 434, 59 Cal. 180.

(75) *Burnes v. Pennell* [1849] 2 H.L.C. 496.

(76) *Bisset v. Wilkinson* [1927] A.C. 177 at pp. 181-82.

(77) *Calcutta Celluloid Works v. Labanya* [1942] 47 C.W.N. 421.

in an action by the company for calls on shares, it is competent for the defendant to say that he has repudiated the contract on the ground of fraud and misrepresentation (77). In cases of voidable contract the repudiation must be prompt and in the absence of such prompt repudiation, it is not permissible to take proceedings to obtain rescission. The position is the same when a person is sued upon a contract and sets up the defence that he was induced to enter into the contract by fraud and misrepresentation entitling him to resist the claim. Such repudiation must however be on the ground of fraud and misrepresentation (77).

**433. Void and ultra vires issue of shares :**—Where an issue of shares is void and *ultra vires*, the general rule is that the subscribers are entitled to get their money back on the ground that there is a failure of consideration and an action against the company will lie for money had and received. But where a shareholder has parted with his shares to another for value and that transfer has been duly registered in the books of the company before the issue of shares is found to be void, the transferor cannot assert that the shares have not been lawfully issued, and much less claim on the ground of a total failure of consideration (78).

**434. Limitation :—**A suit for rescission of a contract to take shares on the grounds of fraud and misrepresentation is governed by Art. 114 of the Limitation Act. (77).

**435. Allotment in contravention of the section :—**The Court has no jurisdiction to restrain directors by injunction from going to allotment in contravention of this section, the proper remedy being a suit against the directors for breach of their statutory duty (79). If the directors proceed to make allotment in contravention of this section, the liability under s. 71 is substituted (80). But a director who was not present at the meeting at which the board determined to go to allotment is not liable (81).

**436. SUB-S. (3). Amount payable on application :—**This sub-section lays down a mandatory requirement. The applicant for shares is under a statutory obligation to pay 5 per cent. of the nominal amount of the shares applied for along with his application, and the company is also under the obligation to see that he does so, and it is against public policy that any allotment should be made without compliance with this requirement. Hence an application for share, if not accompanied by any such payment, does not legally constitute a valid offer so as to entitle the company to demand the share money from the applicant (82). This sub-section is applicable to all allotments whether at the time of floating the company or any subsequent period. Any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is therefore invalid (83). But although sub-s. (6) of the old s. 101 provided that sub-s. (3) thereof was applicable to subsequent allotments also, Mr. Justice Panckridge of the Calcutta High Court held in a later case that there was nothing in that section which forbade the directors to allot shares to applicants who neglected to pay the application money in terms of the prospectus, once the first allotment had been regularly made, although it might be that a provision in the prospectus empowering them to do this would be an

(78) *Karachi Oil Products Ltd. v. Narendra Singhji* [1950] B. 149, 51 Bom. L.R. 1012 ; *Linz v. Electric Wire Co.* [1948] 52 C.W.N. 716, 1948 M.W.N. 459, 3 D.L.R. 7.

(79) *Finance and Issue Ltd. v. Canadian Produce Corpn.* [1905] 1 Ch. 37.

(80) *Burton v. Bevan* [1908] 2 Ch. 240 ; *Hilder v. Dexter* [1902] A.C. 474 at p. 480.

(81) *Burton v. Bevan* (supra).

(82) *Ramlal Sao v. Malak* [1939] N. 225, [1939] N.L.J. 305. See also *Mutual Bank v. Sohan Singh* (infra) and *Indian States Bank v. Sardar Singh* [1934] A. 855.

(83) *Mutual Bank of India v. Sohan Singh* [1935] L. 790, 161 I.C. 952.



infringement of the Act (84). His Lordship said that this was a somewhat unsatisfactory conclusion. But it is submitted respectfully that this was due to the unsatisfactory drafting of the amendment. Sub-s. (1) of old s. 101 which forbade an allotment where five per cent. of the amount of share subscribed had not been paid to or received in cash by the company, did not, by reason of sub-s. (6) thereof apply to subsequent allotments. Still by the retention of sub-s. (3) this difficulty had been created. That sub-section only said that the amount payable on application on each share should not be less than five per cent. of the nominal amount of the share, but there was nothing in that section to show that a subsequent allotment without the payment of application money was void or voidable. The amount payable on application must be paid in cash or by cheque, but cheques that are subsequently dishonoured do not constitute payment, even though immediately replaced by other cheques (85), nor do cheques received and held over though subsequently honoured (86). Allotment made before the money is "paid to and received by" the company is voidable and the money is not received until the cheques are cashed (85) & (86).

**437. Consideration** :—An agreement by a company to pay a sum of money at once for future services and to satisfy the amount by an issue of fully paid shares may be good consideration for the allotment (87). But a company cannot allot two hundred £1 shares for 10s. each in consideration of the allottee making a loan of £100 to the company (88).

**438. Allotment to vendor's nominee** :—If an agreement is made that shares shall be allotted to a vendor "or his nominee," an allotment to the vendor without giving him an opportunity of making a nomination is bad (89).

**439. Allotment of new shares** :—When upon an issue of new shares offer is made to the existing shareholders, the acceptance by the latter completes the contract and no allotment is necessary. Sometimes the offer is coupled with a right to renounce the shares in favour of a third party. In such a case the directors cannot refuse to accept the person in whose favour the renunciation is made, relying upon a clause in the articles entitling them to reject transfers (90).

**440. Allotment to minor** :—In England an allotment made to a minor can at any time before or on attaining majority, be repudiated by the minor, but he cannot merely on the ground of infancy demand repayment of the amount paid (91). But in India a minor's contract being void and not voidable as in England, an allotment made to him is void (92). Where the money was paid on behalf of the minor daughters by the father, and the applications for allotment which were made by the father indicated clearly that the allottees were minors, the transaction was void on the face of it, and the father could not be deemed to have contracted for the shares, and could not be placed on the list of contributories (93).

A suit for allotment money is cognizable by the Court of Small Causes (94).

(84) *Happy India Insurance Co.* [1940] C. 164, [1939] 2 Cal. 512, 187 I.C. 880, dissenting from *Mutual Bank of India v. Sohan Singh*, supra.

(85) *Mears v. Western Canada &c. Co.* [1905] 2 Ch. 353.

(86) *National Motor Mail Coach Co.* [1908] 2 Ch. 228.

(87) *Gardner v. Iredale* [1912] 1 Ch. 700.

(88) *James Pitkin & Co.* [1916] W.N. 112, 114 L.T. 673.

(89) *National Standard Life Assurance Corpn.* [1911] 27 T.L.R. 271.

(90) *Poole Shipping Co.* [1920] 1 Ch. 251.

(91) *Steinberg v. Scala (Leeds), Ltd.* [1923] 2 Ch. 452, overruling *Hamilton v. Vaughan Sherrin &c. Co.* [1894] 2 Ch. 589.

(92) See *Mohori Bibi v. Dharmadas* [1903] 30 Cal. 539 (P.C.), 30 I.A. 114.

(93) *Dalmia Jain Airways Ltd. v. Saroj Rani* [1956] Punj. 41.

(94) *Mohan Lal v. S. G. Cotton Mills* [1900] 4 C.W.N. 369.

**441. Stamp :—**A notice of allotment, though not stamped, is admissible in evidence to establish the fact that the notice of allotment has been given (95). For stamp, see Appendix—"Stamp Duty."

See notes to s. 41.

**70. Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar.—**

(1) A company having a share capital, which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures, there has been delivered to the Registrar for registration a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in Part I of Schedule III and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2) Every statement in lieu of prospectus delivered under sub-section (1), shall, where the persons making any such report as aforesaid have made therein, or have without giving the reasons indicated therein, any such adjustments as are mentioned in clause 5 of Schedule III, have endorsed thereon or attached thereto a written statement signed by those persons, setting out the adjustments and giving the reasons thereof.

(3) This section shall not apply to a private company.

(4) If a company acts in contravention of sub-section (1) or (2), the company, and every director of the company who wilfully authorises or permits the contravention, shall be punishable with fine which may extend to one thousand rupees.

(5) Where a statement in lieu of prospectus delivered to the Registrar under sub-section (1) includes any untrue statement, any person who authorised the delivery of the statement in lieu of prospectus for registration shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five thousand rupees or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of

the delivery for registration of the statement in lieu of prospectus believe, that the statement was true.

(6) For the purposes of this section—

(a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included ; and

(b) where the omission from a statement in lieu of prospectus of any matter is calculated to mislead, the statement in lieu of prospectus shall be deemed, in respect of such omission, to be a statement in lieu of prospectus in which an untrue statement is included.

(7) For the purposes of sub-section (5) and clause (a) of sub-section (6), the expression “included”, when used with reference to a statement in lieu of prospectus, means included in the statement in lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith.

This section corresponds to s. 98 of the previous Act. See s. 101B of the C.L.C.’s redraft and s. 48 of the English Act of 1948—*Notes on Clauses*.

It was originally cl. 64 of the Bill. The Joint Committee has omitted sub-cl. (b) of cl. (6) thereof and made sub-cl. (c) as sub-cl. (b). They have also inserted sub-s. (7) with the following observation : “The wording has been brought into conformity with that in clause 64 as revised by the Committee. Sub-clause (7) corresponds to sub-clause (2) of clause 64” (*vide* J.C.R., para 30).

**442. Statement in lieu of prospectus** :—The requirements of this section about proceeding to allotment are satisfied by the mere filing of the statement in lieu of prospectus, whether the particulars are or are not sufficiently supplied or whether it contains misstatement and omissions ; and an allotment is not vitiated by the want of accuracy (96). Allotment of shares and debentures before a company has filed the statement in lieu of prospectus is not wholly illegal and void (97). The allottee may also be estopped by conduct from denying that he is a member (98).

**443. Effect of false statement** :—If a person applying for shares inspects the statement in lieu of prospectus, the statement becomes the basis of the contract, and if it contains a false statement, he may have a right to rescind (99). A person who subscribes for shares on the faith of a statement in lieu of prospectus cannot claim compensation under s. 62.

Any person who willingly makes a false statement in a statement in lieu of prospectus is guilty of a criminal offence (1).

**71. Effect of irregular allotment.**—(1) An allotment made by a company to an applicant in contravention of the

(96) *Blair Open Hearth Furnace Co.* [1914] 1 Ch. 390.

(97) *Re Jubilee Cotton Mills* [1924] A.C. 958.

(98) *James Burton & Sons* [1927] 2 Ch. 132.

(99) *Blair Open Hearth Furnace Co.* (*supra*) at p. 401.

(1) S. 628.

provisions of section 69 or 70 shall be voidable at the instance of the applicant—

(a) within two months after the holding of the statutory meeting of the company, and not later, or

(b) in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting, within two months after the date of the allotment, and not later.

(2) The allotment shall be voidable as aforesaid, notwithstanding that the company is in course of being wound up.

(3) If any director of a company knowingly contravenes, or wilfully authorises or permits the contravention of, any of the provisions of section 69 or 70 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby :

Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

This section corresponds to s. 102 of the previous Act. Sec s. 101C of the C.L.C.'s redraft, and s. 49 of the English Act of 1948—*Notes on Clauses*. In sub-s. (3) after the word "permits" the word "wilfully" has been added by the Joint Committee.

For the words "one month" in s. 102 of the previous Act the words "two months" have been substituted.

**444. Remedy for irregular allotment and when it is lost:—**As to the remedy of an allottee for irregular allotment, see notes to s. 69. When an allottee after discovering that the allotment has been made in contravention of s. 70 or s. 69 treats the contract as subsisting, as for example by attempting to sell the shares (2), by executing a transfer deed of the shares (3), by paying calls &c. or taking dividends (4), or by attending and voting at a general meeting in person or by proxy (5), he may lose his right to avoid the allotment.

**445. Allotment is voidable only:—**Under this section the allotment is only *voidable* at the instance of the applicant. Until he elects to avoid the contract, it remains good (6). The Act recognizes that the observance of the formalities may be dispensed with, and irregular, as distinguished from void, transaction may be confirmed. Consequently a person may become shareholder to most, if not all, intents and purposes, without complying with all the formalities prescribed in that behalf by a statute, charter or constitution of the company, and although there may be irregularities in the issue of shares to him (7). So where the allottee pays allotment money and subsequently acts as a shareholder without objection, he will not be

(2) *Exp. Briggs* [1866] 14 L.T. 39.

(3) *Crawley's case* [1869] 20 L.T. 96.

(4) *Scholey v. Central Ry. Co. of Venezuela* [1868] 39 L.J. Ch. 345; *Sherman, Exp.* [1896] 66 L.J. Ch. 25.

(5) *Sharpley v. South & East Coast Ry. Co.* [1876] 2 Ch. D. 663.

(6) *Oakes v. Turquand* [1867] L.R. 2 H.L. 325; *Peek v. Gurney* [1873] 1 L.R. 6 H.L. 377.

(7) *Peara Singh v. Peshwar Bank* [1915] 28 I.C. 53.

permitted to raise the question of validity of the allotment : for once the shares have been registered in the name of the allottee and he has done acts only consistent with his being a member, he will be taken to have agreed to take the shares, or at any rate he will be estopped from denying that he has so agreed (7).

**446. Where allotment is valid :—**Where allotment was made by the managing director by virtue of a delegated authority from two other directors who had not paid their allotment moneys there was no valid allotment (8).

**447. Notice avoiding allotment :—**It is not necessary that the dissatisfied applicant should take proceedings within the two months after the statutory meeting or before liquidation is commenced, if he has given notice avoiding the allotment within such time and commenced action within a reasonable time (9). But he will be precluded from avoiding the allotment, if he has expressly, or by conduct, affirmed it with knowledge of the irregularity (10). A small amount of acquiescence after knowledge will bar an allottee's right of rescission (10).

In addition to giving a notice of avoidance the allottee must pray to have his name removed from the register of members. If he adopted those steps within a month (two months in the present section) from the date of the statutory meeting, a winding-up order made during that period would not affect his rights. Otherwise a winding-up order would debar him from coming to Court for rectification of the register, because by that time the rights of third parties had come into existence (11). A notice of repudiation of allotment was not ineffective and invalid merely because it did not set out the ground on which the repudiation was made (11).

So far as the time during which the legal proceedings should be taken, the Calcutta High Court has taken a view somewhat different from that adopted in the English decisions. In 47 C.W.N. 421 *Gentle J.* has held that so long as the company is a going concern, the shareholders may come to Court for avoiding a contract to take shares not necessarily promptly, so long as he comes within the statutory period of limitation. But after a company has gone into liquidation and the rights of third parties as against the shareholders have come into existence, it is not open to the applicant to come to Court to have the register of members rectified. But if he takes legal steps for the purpose within a month (now two months) from the date of the statutory meeting, a winding-up order made within the period will not affect his rights (11).

**448. :—**If any director knowingly contravenes or permits or authorizes the contravention of any of the provisions of s 69, he will be liable to compensate the allottee as well as the company (12).

**449. Where director is not liable :—**A director who was not present at the meeting making the allotment and did not know the irregularity is not liable, even though he was present and voted at a subsequent meeting confirming the minutes regarding the allotment (13).

**450. Effect of a petition for winding up :—**A member cannot be relieved from the shares upon the ground of misrepresentation in the prospectus, on a bill filed after the presentation of a petition for winding up on which an order was subsequently made (14).

As to costs see *Barnett v. Eccles. Corpn.* (15).

(8) *Bank of Peshwar v. Madho Ram* [1919] 51 I.C. 812.

(9) *National Motor Mail Coach Co.* [1908] 2 Ch. 228.

(10) *Finance & Issue Ltd. v. Canadian Produce Corpn.* [1905] 1 Ch. 37.

(11) *Fonseca v. Jupiter Airways Ltd.* [1953] B. 417.

(12) *Indian States Bank v. Sardar Singh* [1934] A. 885, 154 I.C. 33.

(13) *Burton v. Bevan* [1908] 2 Ch. 240.

(14) *Kent v. Freehold Land Co.* [1868] 3 Ch. App. 493.

(15) [1900] 2 Q.B. 104.

**451. Limitation** :—A special limitation of two years is prescribed by the section for instituting proceedings for damages against directors.

**72. Applications for, and allotment of, shares and debentures.**—(1) (a) No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally, and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the fifth day after that on which the prospectus is first so issued or such later time, if any, as may be specified in the prospectus :

Provided that where, after a prospectus is first issued generally, a public notice is given by some person responsible under section 62 for the prospectus which has the effect of excluding, limiting or diminishing his responsibility, no allotment shall be made until the beginning of the fifth day after that on which such public notice is first given.

(b) Nothing in the foregoing proviso shall be deemed to exclude, limit or diminish any liability that might be incurred in the case referred to therein under the general law or this Act.

(c) The beginning of the fifth day or such later time as is mentioned in the first paragraph of clause (a), or the beginning of the fifth day mentioned in the second paragraph of that clause, as the case may be, is hereinafter in this Act referred to as “the time of the opening of the subscription lists”.

(2) In sub-section (1), the reference to the day on which the prospectus is first issued generally shall be construed as referring to the day on which it is first so issued as a newspaper advertisement :

Provided that, if it is not so issued as a newspaper advertisement before the fifth day after that on which it is first so issued in any other manner, the said reference shall be construed as referring to the day on which it is first so issued in any manner.

(3) The validity of an allotment shall not be affected by any contravention of the foregoing provisions of this section ; but, in the event of any such contravention, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(4) In the application of this section to a prospectus offering shares or debentures for sale, sub-sections (1) to (3)

shall have effect with the substitution of references to sale for references to allotment, and with the substitution for the reference to the company and every officer of the company who is in default of a reference to any person by or through whom the offer is made and who is knowingly guilty of, or wilfully authorises or permits, the contravention.

(5) An application for shares in, or debentures of, a company, which is made in pursuance of a prospectus issued generally shall not be revocable until after the expiration of the fifth day after the time of the opening of the subscription lists, or the giving, before the expiry of the said fifth day by some person responsible under section 62 for the prospectus, of a public notice having the effect under that section of excluding, limiting or diminishing the responsibility of the person giving it.

This section is new. It is based on the C.L.C.'s redraft and s. 50 of the English Act of 1948. The proviso to sub-s. (1) of this section has been suggested by the C.L.C.; it is not found in the English Act—*Notes on Clauses*.

This was originally cl. 66 of the Bill, sub-cl. (6) of which has been omitted by the Joint Committee as being unnecessary (*vide* J.C.R., para 31).

**73. Allotment of shares and debentures to be dealt in on stock exchange.**—(1) Where a prospectus, whether issued generally or not, states that application has been or will be made for permission for the shares or debentures offered thereby to be dealt in on a recognised stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void, if the permission has not been applied for before the tenth day after the first issue of the prospectus or, if the permission has not been granted before the expiry of three weeks from the date of the closing of the subscription lists or such longer period not exceeding six weeks as may, within the said three weeks, be notified to the applicant for permission by or on behalf of the stock exchange.

(2) Where the permission has not been applied for as aforesaid, or has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent. per annum from the expiry of the eighth day :

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank so long as the company may become liable to repay it under sub-section (2) ; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(4) Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of this section shall be void.

(5) For the purpose of this section, permission shall not be deemed to be refused if it is intimated that the application for permission though not at present granted, will be given further consideration.

(6) This section shall have effect—

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied therefor in pursuance of the prospectus ; and

(b) in relation to a prospectus offering shares for sale, with the following modifications, namely,—

(i) references to sale shall be substituted for references to allotment ;

(ii) the persons by whom the offer is made, and not the company, shall be liable under sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly ; and

(iii) for the reference in sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of, or wilfully authorises or permits, the default.

(7) No prospectus shall state that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange.



This section also is new. It is based on s. 101E of the C. L. C.'s redraft and s. 51 of the English Act of 1948. One change of substance has been made ; it is laid down that permission to deal in the stock exchange should have been granted in respect of shares and debentures. The mere fact that the permission has *not* been refused will not be sufficient—*Notes on Clauses*.

This was originally cl. 67 of the Bill. The Joint Committee have inserted sub-ss. (5) and (7) with the following observations : —“Sub-clause (5)—This is based on a corresponding provision in the English Act—section 51 (5)—the adoption of which the Committee consider desirable.

“Although permission for shares and debentures may not have been granted, yet, if the stock exchange has agreed to give further consideration to the application for the shares or debentures being dealt in on a stock exchange, it is only reasonable to treat the case as one where permission has not been refused.

“**Sub-clause 7** :—It is very desirable that a prospectus should not state that application has been made for a proposed issue of shares or debentures being dealt in on a stock exchange unless it is a recognised stock exchange” (*vide* J.C.R., para 32).

**Sub-s. (3)** :—Where the subscribers paid the application moneys on the faith of a promise contained in the circular letter not only to refund the money if, as happened, certain conditions were not fulfilled, but also to retain the money in a separate account meanwhile, the allotment moneys were repayable to the subscribers who became entitled to a lien or equity on the fund so subscribed (16).

**74. Manner of reckoning fifth, eighth and tenth days in sections 72 and 73.**—In reckoning for the purposes of sections 72 and 73, the fifth day, the eighth day, or the tenth day after another day, any intervening day which is a public holiday under the Negotiable Instruments Act, 1881 (XXVI of 1881), shall be disregarded, and if the fifth, eighth, or tenth day (as so reckoned) is itself such a public holiday, there shall for the said purposes be substituted the first day thereafter which is not such a holiday.

This section also is new. It has been based on s. 101D (6) of the C.L.C.'s redraft and s. 50 (6) of the English Act of 1948. As the provision is one which applies both to cls. 66 and 67 (now ss. 71 and 72) it is considered more appropriate to put it as an independent section—*Notes on Clauses*.

**75. Return as to allotments.**—(1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

(a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allottees, and the amount, if any, paid or due and payable on each share ;

(b) in the case of shares ( not being bonus shares ) allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the Registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or a contract for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the Registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted ; and

(c) in the case of bonus shares, file with the Registrar a return stating the number and nominal amount of the bonus shares so allotted.

(2) Where a contract such as is mentioned in clause (b) of sub-section (1) is not reduced to writing, the company shall, within one month after the allotment, file with the Registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing ; and those particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899 (II of 1899), and the Registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

(3) If the Registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit ; and if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the Registrar were substituted.

(4) If default is made in complying with this section, every officer of the company who is in default shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the Registrar any document required to be filed by this section within the time specified therein, the company, or any officer who is in default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental

or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper.

(5) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.

This corresponds to s. 104 of the previous Act and s. 52 of the English Act of 1948. As recommended by the C.L.C. (p. 299 of the Report) a separate provision has been made for the case of bonus shares. In their case, no contract in writing need be filed with the Registrar—*Notes on Clauses*.

This was originally cl. 69 of the Bill. The Joint Committee have made some alterations therein with the following remark:—“The Committee have omitted the explanatory definition of ‘bonus shares’ in sub-clause (1) (c) and also the words ‘and the extent to which they are to be treated as paid up’ occurring at the end (*vide* J.C.R., para 33).

**452. Failure to file return of allotment:—**The directors and managers are to furnish to the Registrar the return of allotment as provided in this section, and their failure to do so renders them liable to the penalties provided in sub-s. (4). A plea of ignorance of the law will not be accepted as an excuse; but where the default is not intentional, the full or a heavy penalty may not be exacted (17).

**453. Contract for fully or partly paid up shares:—**This clause is in favour of creditors of the company and does not apply as between the company and its shareholders (18). There is no fraud on the part of the company towards a purchaser of shares in not registering a contract as to the issue of those shares as paid up (18). In order to comply with cl. (b) of sub-s. (1) it is not necessary that within the four corners of the filed contract there should be a complete identification of the property other than cash which is the consideration given for the shares, provided the filed contract states plainly the nature of the consideration, and supplies the means of identification by reference to an unfiled contract which contains a full description of the consideration (19). Where there is a contract referred to in sub-s. (b), but it is not filed with the Registrar, the only consequence of the failure to file it will be the penalty under sub-s. (4); and the allottee is not responsible as a contributory for calls as though the shares were unpaid shares (20). On the other hand if the consideration for the shares is illusory, or permits an obvious money-measure to be made showing that discount has been allowed, filing the contract with the Registrar will not relieve the allottee from the obligation to pay the nominal value of the shares or the amount of the discount in cash. But the Court is not bound to inquire in each case whether the price was reasonable or whether what was given for the shares had a cash value in the market equal to the nominal value of the shares (21).

Where by mistake the contract to fully paid up shares was not filed with the Registrar and on discovering the mistake one of the allottees gave notice of motion

(17) *Emp. v. Nathuram* [1919] 20 Cl. L.J. 725, 52 I.C. 885; see also *James Pitkin & Co.* [1916] W.N. 112, 114 I.T. 673.

(18) *Blyth's case* [1876] 4 Ch. D. 140.

(19) *African Gold Concession &c. Co.* [1899] 1 Ch. 414, *affd.* on appeal [1899] 2 Ch. 480.

(20) *Prem Behari v. S. B. Billimoria & Co.* [1926] 24 A.L.J. 576, 48 All. 503, 95 I.C. 570, [1926] A. 524; but see *Motilal v. Thakore Lal* [1912] 36 Bom. 557; *Hartley's case* [1875] 10 Ch. App. 157.

(21) *In re Theatrical Trust*, *Chapman's case* [1895] 1 Ch. 771.

for an order to rectify the register of members, but before the motion was heard, the company was ordered to be wound up, it was *held* that rectification of the register should only be ordered on the terms that due provision should be made for all the debts and liabilities of the company which had accrued between the dates of issuing the shares and giving the notice of motion (22).

**454. Estoppel :—**A company issuing fully paid up shares by virtue of a contract not registered under this clause is estopped by the share certificate as against a transferee for value without notice of the irregularity from saying that they had not been so paid up and the official liquidator on winding up of the company is in the same position (23).

**455. Where contract for fully paid up shares is valid :—**Although a limited company cannot release a shareholder from the obligation to pay for his shares either in money or money's worth and cannot therefore issue its shares at a discount, it can, provided the contract is duly registered, buy property at any price it thinks fit, and can pay for such property in fully paid up shares (24). The transaction will be valid and binding upon its creditors if the company has acted in it honestly and not colourably and has not been so imposed upon by the vendor as to be relieved from the bargain (24).

**456. Value received by company :—**The value received by the company is measured by the price at which the company agreed to buy the property, and whilst the transaction is unimpeached, that is the only value which the Court can take into consideration (24).

**457. Payment in money's worth :—**Payment in money's worth is sufficient payment (25), so is the extinguishment of debt due from the company to the shareholder (26), even though no call has been made and no debt is presently due to the company (27). It is not material that the company has not entered the payment in its books (28). Where under an agreement in consideration of his giving up certain benefits, the director should receive a sum of money equal to three-fourths of the amount paid up by him upon his shares and that sum was credited to him in the books of the company in pursuance of the agreement, it was *held* that the amount so credited was equal to a cash payment by him and there was nothing fraudulent or improper in such an agreement being entered into (29).

**458. Set off :—**Although a company may agree to accept some other form of payment or set off of an existing debt (30) against a present liability to pay calls (31), a release without payment in money or money's worth or on payment of less than the full amount is *ultra vires*. But any circumstances creating a set off or an agreement to render service may be a good payment (32).

(22) Preservation Syndicate [1895] 2 Ch. 768.

(23) British Farmers &c. Co. [1878] 7 Ch. D. 533.

(24) *In re Wragg Ltd.* [1897] 1 Ch. 796; Pell's case [1869] 5 Ch. App. 11; *Oorgnm &c. Co. v. Roper* [1892] A.C. 125; *Hongkong & China Gas Co. v. Glen* [1914] 1 Ch. 527.

(25) *Drummond's case* [1869] 4 Ch. App. 772; Pell's case [1869] 5 Ch. App. 11; *Baglan Hall Colliery Co.* [1870] 5 Ch. App. 346; *re Wragg Ltd.* (supra) at pp. 835-38.

(26) *Fothergill's case* [1873] 8 Ch. App. 270; *Balgan Hall Colliery Co.* (supra).

(27) *Jones Lloyd & Co.* [1880] 41 Ch. D. 159.

(28) *Re Theatrical Trust*, *Chapman's case* [1895] 1 Ch. 771.

(29) *Exp. Bentley* [1879] 12 Ch. D. 850.

(30) *Spargo's case* [1873] 8 Ch. App. 407.

(31) *In re Wragg Ltd.* (supra); Pell's case (supra).

(32) *In re Theatrical Trust* (supra).

**459. Ultra vires :—**"It is beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid up shares for nothing and preclude itself from requiring payment in money or money's worth" (33). An agreement to accept the supply of goods at a future time against calls is not valid (34). An agreement by the company to pay a sum of money at once for future services, e.g., erection of a building and to satisfy the amount by an issue of fully paid up shares, may however be a good consideration for the issue of those shares (35).

**460. Consideration :—**If the consideration be in kind, the Court will not inquire whether it was really of value equal to the nominal amount of shares issued (unless the consideration is illusory), or permitted of an obvious money value (36), but the written contract may go very far to establish that the consideration is not illusory, even if there is much to point to its being excessive ((37).

Where under the condition of a debenture deed the debenture holder is allotted some ordinary shares on surrender of his debenture, the allotment of fully paid up shares in exchange for his debenture is an allotment of shares "as fully paid up otherwise than in cash" within the meaning of sub-s. (1), clause (b) of this section (38).

A company cannot validly contract for a fixed present consideration that upon every increase of capital a definite proportion of the new shares shall be issued as fully paid to the vendor (39).

The surrender of a right to payment of a sum of bonus payable out of profits only when no profits have been earned is not a good consideration either in cash or in kind of the issue of fully paid shares (40).

The Act does not require that the contract to be registered should identify the shares by numbers (41).

As to the meaning of the word "issue," see the cases noted below (42).

**461. Proviso to sub-s. (4) :—**Under the proviso to sub-s. (4) particulars of inadvertence must be set out in the affidavit (43). The word "inadvertance" includes cases where there has been delay in adjudicating on the stamp duty (44). When a document is sought to be filed with the Registrar after expiry of the time, he should file it and inform the officer presenting it that unless within the time to be specified by the Registrar the company obtains an order from the Court extending the time, he will take steps to prosecute the officer for default. The effect of accepting and filing the documents after time by the Registrar does not relieve the defaulter from liabilities without proper relief being granted by the Court (45). The registration of the articles is not the registration of a contract within the meaning of this section. It must be a contract which shows what shares are to be issued as fully paid up and for what consideration (46).

(33) *Eddystone Marine Insurance Co.* [1893] 3 Ch. 9.

(34) *Pellatt's case* [1867] 2 Ch. App. 527; *Ex. parte Clark* [1869] 7 Eq. 550.

(35) *Gardner v. Iredale* [1912] 1 Ch. 700.

(36) *Theatrical Trust (supra)*; *Almada & Tirito Co.* [1888] 38 Ch. D. 415; *re Wragg Ltd.* [1897] 1 Ch. 796; *Oreogum Gold Mining Co. v. Roper* [1892] A.C. 125.

(37) *Re Innes & Co.* [1903] 2 Ch. 254.

(38) *Thodapuzha Rubber Co.* [1917] 42 I.C. 674, 33 M.L.J. 474.

(39) *Hongkong & China Gas Co. v. Glen* [1914] 1 Ch. 527.

(40) *Bury v. Ramatina Development Corp.* [1910] A.C. 439.

(41) *Elsner & Mc Arthur's case* [1895] 2 Ch. 759; *Jackson & Co.* [1899] 1 Ch. 348.

(42) *Bush's case* [1874] 9 Ch. App. 554; *A. G. v. Regent's Canal & Dock Co.* [1904] 1 K.B. 263, 270.

(43) *Victoria Brick Works* [1898] 5 Manson 350, [1898] W.N. 162.

(44) *Luckey Guss, Ltd.* [1898] 79 L.T. 722.

(45) *Ramackers & Co.* [1930] C. 146, 56 Cal. 976. See now the Proviso to sub-s. (4).

(46) *Crickmers's case* [1875] 10 Ch. App. 614.

**462. "Contract in writing" :—**Ratification of previous contracts with vendors of business by the board of directors cannot be described as a contract in writing constituting the title of the allottee within the meaning of sub-s. (1) (b) (47).

**463. Stamp :—**If a liquidator finds that a contract for the allotment of shares has not been stamped and filed, it is his duty to stamp it at the expense of the company and file it when stamped (48). This section does not require that a duty payable on a conveyance should be levied on an agreement for allotment of shares in future (49). If after entering into a contract for sale the parties, inspite of the risk that either party may refile from the contract, refrain from getting an actual deed of conveyance executed, they can successfully evade the payment of a higher duty (49). In the last cited case the vendor company entered into an agreement on the 26th January, 1921 to sell all their business, undertaking and assets including goodwill &c., with effect from the 1st January, 1920. The agreement recited that the purchase shall be completed on such date as shall be mutually arranged. Afterwards a sale deed was executed by the vendor in respect of the immovable property but no deed of transfer was executed as regards the goodwill and movable property. The agreement deed was stamped as agreement with eight annas stamp : *held* that the agreement deed did not amount to a conveyance, but was merely a contract to sell, although the parties intended that when completed it should take effect from 1st January, 1920. So it was properly stamped. The allotment of shares in such cases would not by its nature amount to a transfer of property within the meaning of s. 2 (10) of the Stamp Act, because the company cannot be regarded in any sense as the owner of its own shares, so when it issues or allots shares, it cannot be said to be transferring property (50).

**464. :—**Sub-S. (1) (b) of this section requires the contract, "constituting the title of the allottee" to be filed with the Registrar. If this contract consists merely of an agreement to transfer properties in the future, the particulars thereof cannot be treated as a transfer of properties *in presentia*. Sub-s. (2) clearly lays down that the particulars would be liable to the same stamp duty as would have been payable if the contract of which the particulars are supplied had been reduced to writing (51). In the last cited case the contract was oral; but it does not make any difference if the contract is in writing (52).

### Commissions and Discounts

**76. Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.—(i)** A company may pay a commission to any person in consideration of—

(a) his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in, or debentures of, the company, or

(47) *Ramsawamy v. Chengalroya* [1926] M. 380, 27 Cr. L.J. 700.

(48) *In re X. Company* [1907] 2 Ch. 92.

(49) *Incorporation of the Swadeshi Cotton Mills Co.* [1932] A. 291, [1932] A.L.J. 394, 131 I.C. 337. (S.B.) [*Comrs. Inland Revenue v. Angus & Co.* (1889) 23 Q.B.D. 579 (593) relied on]; see also *Secretary Board of Revenue v. Madura Mills Co.* [1937] M. 259, [1937] M.L.J. 108 (F.B.).

(50) *Secretary Board of Revenue v. Madura Mills Co.*, (supra).

(51) *Bholaram & Sons v. Emp.* [1934] L. 530, Sp. Bench, 15 Lah. 501, 150 I.C. 781.

(52) *Lakshmi Iron & Steel Manfg. Co. v. Emp.* [1934] L. 533, Sp. Bench, 15 Lah. 509, 150 I.C. 790.

(b) his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in, or debentures of, the company,

if the following conditions are fulfilled, namely :—

(i) the payment of the commission is authorised by the articles ;

(ii) the commission paid or agreed to be paid does not exceed in the case of shares, five per cent. of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less, and in the case of debentures, two and a half per cent. of the price at which the debentures are issued or the amount or rate authorised by the articles, whichever is less ;

(iii) the amount or rate per cent. of the commission paid or agreed to be paid is—

in the case of shares or debentures offered to the public for subscription, disclosed in the prospectus ; and

in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the Registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares or debentures, is issued, also disclosed in that circular or notice ; and

(iv) the number of shares or debentures which persons have agreed for a commission to subscribe absolutely or conditionally is disclosed in the manner aforesaid.

(2) Save as aforesaid and save as provided in section 79, no company shall allot any of its shares or debentures or apply any of its capital moneys, either directly or indirectly, in payment of any commission, discount or allowance, to any person in consideration of—

(a) his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in, or debentures of, the company, or

(b) his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in, or debentures of, the company,

whether the shares, debentures or money be so allotted or applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

(4) A vendor to, promoter of, or other person who receives payment in shares, debentures or money from, a company shall have and shall be deemed always to have had power to apply any part of the shares, debentures or money so received in payment of any commission the payment of which, if made directly by the company, would have been legal under this section.

(5) If default is made in complying with the provisions of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

This corresponds to s. 105 of the previous Act and s. 53 of the English Act of 1948. As suggested by the C.L.C. (page 300 of the Report), it has been laid down that the rate of the commission should not exceed 10 per cent. and a maximum penalty of 500 rupees has also been imposed—*Notes on Clauses*.

This was originally cl. 70 of the Bill. The Joint Committee being of the opinion, that the ceiling of ten per cent., provided for the commission was high have reduced it to five per cent. (*vide* J.C.R., para 34).

In this section at several places the words, "debentures", and "or debentures" have been inserted by the Lok Sabha, thus making the section applicable to debentures as well as shares. In cl. (iii) of sub-s. (1) before "five per cent." the words "in the case of shares" and the words "and in the case of debentures" etc. at the end of cl (iii) have also been introduced by the Lok Sabha.

**465. Company cannot issue shares at a discount:**—Subject to the statutory provision as to paying commission for the underwriting of shares and as to paying the usual brokerage, a company cannot issue shares at a discount (53), even by way of compromise (54), or in any other indirect way (55). Contract for doing so is void (56), and cannot be enforced (57). If an agreement for the issue of the shares is such that in the course of its due working out there is as much as a possibility that in the result the shares will have been issued at a discount, then the issue of the shares as fully paid cannot be justified (58). In a winding up proceed-

(53) *Ooregum G. M. Co. v. Roper* [1892] A.C. 125.

(54) *Mother Lode Gold Mines v. Hill* [1903] 19 T.L.R. 341.

(55) *Mosely v. Koffyfontein Mines* [1904] 2 Ch. 108; *Famatina D. Corpn. v. Bury* [1910] A.C. 439.

(56) *Welton v. Saffery* [1897] A.C. 299; *James Pitkin & Co.* [1916] W.N. 112, 114 L.T. 673 (ignorance of legal effect of an allotment is no excuse).

(57) *Alamada & Tiritio Co.* [1888] 38 Ch. D. 415.

(58) *Trustees Corpn. (India) Ltd. v. Commrs. of Income Tax* [1930] P.C. 151, 57 I.A. 152, 54 Bom. 437, 34 C.W.N. 709; *Mosely v. Koffyfontein Mines* (supra).



ing the holder of shares issued at a discount must make good the deficiency (59). An agreement to issue bonus shares as fully paid up to subscribers of debentures is *ultra vires* the company and is void (60). Upon liquidation the holders of such shares will be liable to pay up the full amount in cash (60).

A company has no power to issue shares at a discount so as to render the shareholder liable for a smaller sum than that fixed for the value of the shares by the memorandum of association, and such issue shall be invalid, although the contract with the shareholder has been registered (61).

**466. Set off may be valid :—**An agreement by a shareholder with the company to set off against future calls a present liability of the company to pay cash may however be valid, if registered (62). An agreement by a company to grant its contractor shares on payment of the allotment money, the balance to be recovered in cash or from value of goods supplied, does not contravene this section (63).

**467. Allottee's liability :—**It being *ultra vires* for a limited company to issue shares at a discount or by way of bonus, although authorized to do so by the articles, the holders of such shares are not thereby relieved from liability in a winding up to calls for the amounts unpaid on their shares (64).

"It is beyond the powers of a limited company", observed Lord Macnaghten, "to limit the liability of shareholders in a manner inconsistent with the conditions of the memorandum of association. The directors therefore had no authority from the company to issue shares at a discount or on any terms relieving the shareholder from liability to pay in full. The shareholders had no power to authorize the directors to do on behalf of the company that which the company itself could not authorize them to do. The articles of association no doubt empower the directors to issue shares on such terms as they think fit consistently with the provisions of the Companies Act. The articles in express terms purport to authorize the directors to issue shares at a discount. That provision, however, is in contravention of the statute, and simply void ; neither the company, nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind" (65).

To pay commission to a person for taking shares is akin to issuing shares at a discount ; but they are not the same things, for if the company goes into liquidation before the commission is paid, the whole amount of the shares can be called up, but the shareholder will be an unsecured creditor for the commission and may not get in full (66).

**468. Rate of commission and payment of a lump sum :—**If the articles of association allow commission at a specified rate, a commission consisting of a lump sum cannot be paid (67). The payment of a small commission however, e.g., 2½ per cent. to the brokers for their services as such is not *ultra vires* (68). The Court will look at the substance of the transaction and will prohibit a pretended purchase and re-sale which is in fact only a device to cover payment of a commission (67).

(59) *Weymouth &c. Packet Co.* [1891] 1 Ch. 66. (C.A.) ; *Welton v. Saffery* (supra).

(60) *Time Table Publishing Co.* [1893] 68 L.T. 649.

(61) *Almada & Tirito Co.* [1888] 38 Ch. D. 415.

(62) *Jones Lloyd & Co.* [1889] 41 Ch. D. 159.

(63) *Hansraj v. Asthana* [1932] P.C. 240.

(64) *Welton v. Saffery* (supra) at p. 321.

(65) *Welton v. Saffery* (supra) at p. 321.

(66) *Keatinge v. Paranga Consolidated Mines* [1902] W.N. 15, 18 T.L.R. 266.

(67) *Booth v. New A. G. Mining Co.* [1903] 1 Ch. 295.

(68) *Metropolitan C. C. Association v. Scrimgeour* [1895] 2 Q.B. 604.

Previously the commission might be of any amount (69). The payment of commission must be authorized by the articles ; authority in the memorandum is not sufficient (70).

**469. Disclosure of commission :—**A private company which had powers under its articles to pay commission to any person procuring subscription for its shares, offered to the plaintiff a specified commission in consideration of her being the means of providing any sum that they might accept from her information. The amount or rate of this commission was not disclosed in any statement prescribed by the Act. A person introduced by the plaintiff advanced money to the company who allotted shares in respect of it and paid to the plaintiff a sum on account and in part payment of the commission. The plaintiff sued for the balance of her commission and the company counter-claimed for the payment made. It was held : (1) that the commission was not brokerage within the meaning of the section ; (2) that it was unlawful as not disclosed under the provisions of the statute, so the plaintiff could not recover the balance claimed, and (3) that the company could not recover the sum already paid (71). Where a person applies for obtaining certain shares in the expectation of obtaining some commission or special gain and an arrangement is made in accordance therewith by the promoters, and the application is granted, the applicant, on allotment, becomes a shareholder *in presentia* absolutely, the breach or the unenforceability of the latter arrangement under this section being a collateral agreement does not in any way interfere with the liability of the person as contributory on liquidation of the company (72).

**470. Meaning of "underwriting" :—**In England prior to the Act of 1900 a company had no power to pay a commission to a person upon the issue of its share (73) capital, and the position of an underwriter was in no way different (73). The word underwriting means agreeing to take so many shares as are specified in the underwriting letter, if the public or other persons do not subscribe for them (74). The consideration is the payment of a commission whether the underwriter is called upon to take up any shares or not. It has been held by the House of Lords that an agreement giving the underwriter an option to subscribe for further shares as consideration for underwriting is not an application for shares in payment of commission within the section, and is lawful (75). Where the shares are at a premium an allotment for less than premium, but not below par, is not an allotment at a discount (75).

The underwriting letter usually authorizes the person to whom it is addressed to apply in the name of the underwriter should he fail to do so when called upon (76). Such an authority is said to be an "authority coupled with an interest" and therefore after acceptance by the promoter, it is irrevocable (77) ; but in such a case, before so applying, the recipient must carefully perform all conditions. He must have accepted the underwriting letter and communicated his acceptance to the underwriter to make the bargain a binding one (78). If the words "when called

(69) *Keating v. Paranga Consolidated Mines*, *supra*.

(70) *Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139.

(71) *Andra v. Zinc Mines of Great Britain* [1918] 2 K.B. 454.

(72) *Dehra Dun Mussooree Electric Tramways Co.* [1930] A.L.J. 139, 52 All. 406, [1930] A. 357.

(73) See *Australian Investment Trust v. Strand & P. S. Properties* [1932] P.C. 212, [1932] A.C. 735.

(74) *London P. F. M. Corporation* [1897] 13 T. L. R. 569 ; *Australian Investment Trust v. Strand & P. S. Properties* (*supra*).

(75) *Hilder v. Dexter* [1902] A.C. 474 [overruling *Burrows v. Matabele & Co.* [1901] 2 Ch. 23].

(76) *Exp. Audian* [1889] 42 Ch. D. 1.

(77) *Carmichael's case* [1896] 2 Ch. 643 ; *Olympic & Co. Reinsurance Co.* [1920] 1 Ch. 582, on appeal 2 Ch. 341.

(78) *Consort & Co. Mines* [1897] 1 Ch. 575.

upon" are used, the underwriter must have been first called upon to subscribe (79). In many cases the underwriting agreement itself establishes contract to take shares at once (80).

Where the underwriting letter contains a provision that it is to hold good notwithstanding any variation in the prospectus, the underwriter will not be bound if the changes are such as practically constitute a different venture (81).

The retention of the underwriting letter by the promoter with the consent of the underwriter raises an inference that the bargain is complete (82). If the underwriting letter states that "this engagement is binding for two months," the Court of Appeal has held that it means "this offer shall remain open for two months" and an acceptance even after the subscription lists were closed is binding (83).

**471. Repudiation by underwriter:**—An underwriter who takes up shares on the faith of a prospectus containing untrue statements has the same right to repudiate the shares as any other subscriber (84). But in the case noted below (85) the Court of Appeal in England decided an "important and interesting point" as observed by Lord Hanworth M. R. at p. 28 of the report. The plaintiff's case was that he took shares in the company through certain sub-underwriters relying on some representations in the draft prospectus which was adopted by the company after incorporation. As these representations subsequently became falsified, he claimed rescission of the contract, removal of his name from the register of members and return of the money paid to the company. The plaintiff was the undisclosed principal of the sub-underwriters who gave him a letter of renunciation on the strength of which the plaintiff upon payment of the allotment money got his name registered in respect of those shares. Their Lordships discussed the rights of an undisclosed principal and held that generally speaking he is entitled to enforce the contract made by the agent on his behalf, but this rule does not apply where the agent contracts in such terms as import that he is the real and only principal. "A contract to become a member of a company is, in my opinion, one of that class of contract in which an undisclosed principal cannot insist on taking the place of a party apparently contracting on his own account" [per Lawdence J. J. at p. 36]. "In such a case it is not right to treat the agent as necessarily interchangeable with his principal so as to enable the principal to come forward and seek to disaffirm the contract on the ground of a misrepresentation on which he alone had relied."

As to the letter of renunciation it was held in this case that the acceptance at a later date of the plaintiff could not be said to be an acceptance by the company of the plaintiff on the basis of the prospectus. The letter of renunciation printed on the allotment letter was in the following form :

"When the balance (if any) due on the allotment has been paid by you this letter of allotment can be renounced until January 1928 in favour of any other person provided the form of renunciation below is duly completed and signed, and that the person in whose favour the renunciation is made signs the form of acceptance, also below. . . . Renounced allotment letters must be forwarded to the transfer office of the company as shown on the reverse side of this letter, on or before January 21, 1928. Thereafter it will only be possible to transfer such shares by deed in the ordinary way." Then comes the form for renunciation : "To the Directors of the Associated Greyhound Racecourse, Ltd. Gentleman I/We hereby renounce my/our right to the within-named shares; and nominate. . . . to have all the benefits

(79) Ormerod's case [1894] 2 Ch. 474 ; Ex. p. Cox Hughes [1896] 75 L.T. 669.

(80) Exp. Audian [1889] 42 Ch. D. 1.

(81) Warner International Co. v. Kilburn, Brown & Co. [1914] W.N. 61, 30 T.L.R. 284.

(82) Ormerod's case, supra ; Ex. p. Cox Hughes, supra.

(83) Hindley's case [1896] 2 Ch. 121.

(84) Karberg's case [1892] 3 Ch. 1 (C.A.)

(85) Collins v. Associated G. Race Course Ltd. [1930] 1 Ch. 1.

thereof . . . . Signature of Holder." Then there is a form of acceptance to be signed by the nominee : "I/We hereby accept the nomination to the rights to the within-named shares, and I/We authorise you to place my/our name(s) on the register of members in respect of the said shares" (86).

**472. Deceased underwriter :—**The contract of underwriting is enforceable against the executors of the deceased underwriter (87), and even if there are duties of finding capital, this is not such a personal contract as to expire with the contractor (88).

**473. Caution :—**The company should see that all the underwriters have paid their application money and that their cheques have been cashed, otherwise in the event of the issue being a failure a few underwriters by combining not to pay the application money or stopping their cheques may prevent the company from going to allotment as was done in *Mears v. Western Canada Pulp & Paper Co.* (89). It should be remembered that it is a condition precedent to a valid allotment that the whole of the application money should have been paid to and received by the company in cash. Any means by which money can be remitted may be used ; but the remittances or cheques must be cleared and the actual cash received by the company before allotment (89).

Where the underwriting commission was authorised by the articles not to exceed 25 per cent., an agreement for underwriting shares upon a reconstruction of the company for a commission of 10 per cent. was held to be perfectly legal (90).

**474. "Shares offered to the public" :—**The words "shares offered to the public" do not mean shares offered by a promoter to a few of his friends, relations or customers (91). For the meaning of "placing" shares as distinguished from subscribing for shares see *Garrison's case* [1873] 1 Ch. App. 507, 515.

**475. "Statement in the prescribed form" :—**The expression "statement in the prescribed form" seems to allow a second statement in lieu of prospectus to be filed where the original statement did not disclose the intention to pay commission. The statement required to be filed under this sub-section with the Registrar disclosing the amount or rate of commission to be paid by the company in the case of shares not offered to the public must be filed before the shares are allotted (92).

**476. SUB-S. (2) :—**In respect of the words "apply any of the shares or capital moneys" in sub-s. (2) Lord Davey has said that they naturally mean "apply its capital, either in the form shares before issue when they may be described as potential capital, or in the form of money derived from the issue of shares" (93), and following the dictum Warrington J. has decided that commission cannot be paid out of premium payable to the company on the issue of the shares (94). Unless it is possible to make the issue of the shares the exclusive consideration for rendering the service contemplated under sub-s. (2) apart from the issue of capital the transaction will be in direct contravention of the said sub-section (95).

**477. SUB-S. (3). Limits of brokerage :—**The limits within which brokerage may be paid seem to be this, as pointed out by Lord Justice Lopez : "When it

(86) *Collins v. Associated G. Race Course, Ltd.*, supra.

(87) *Warner Engineering Co. v. Brennan* [1913] 30 T.L.R. 191.

(88) *Re Worthington, ex p. Pathé Frères* [1914] 2 K.B. 299.

(89) [1906] 2 Ch. 353.

(90) *Barrow v. Paringa Mines* [1909] 2 Ch. 658.

(91) *Booth v. New Afrikander G. M. Co.* [1903] 1 Ch. 295.

(92) *André v. Zinc Mines of Great Britain* (supra).

(93) *Hilder v. Dexter* [1902] A.C. 474 at p. 480.

(94) *Shorto v. Colwill* [1909] W.N. 218, 101 L.T. 598.

(95) *Banking Service Corp'n. v. Toronto Finance Corp'n.* [1928] A.C. 333 (P.C.).

is made out that the services of the broker are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company and that the payment of the commission of so much per cent. is a fair and just payment for services rendered" (96) a brokerage may be paid. It would not be safe to pay more than 5 per cent.

**478.** Shares may be issued at a premium (97) and such premium might be regarded as profit available for paying dividend (98).

This section applies to private as well as public companies (95) and commissions illegally paid can be recovered (99).

**77. Restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares.—**(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104 or of section 402.

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company :

Provided that nothing in this sub-section shall be taken to prohibit—

(a) the lending of money by a banking company in the ordinary course of its business ; or

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company ; or

(c) the making by a company of loans, within the limit laid down in sub-section (3), to persons (other than directors, managing agents, secretaries and treasurers or managers) *bona fide* in the employment of the company,

(96) *Metropolitan C. C. Assn. v. Scrimgeour* [1896] 2 Q.B. 604 at p. 609.

(97) *Greater Britain Re-insurance Corpn.* [1921] 124 L.T. 194 ; see also *York & N. M. Ry. Co.* [1845] 16 Beav. 485.

(98) *Hoare & Co.* [1904] 2 Ch. 208. But see now s. 78.

(99) *Dominion of Canada Lc. Syndicate v. Brigstocke* [1911] 2 K.B. 648.

with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) No loan made to any person in pursuance of clause (c) of the foregoing proviso shall exceed in amount his salary or wages at that time for a period of six months.

(4) If a company acts in contravention of sub-sections (1) to (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

(5) Nothing in this section shall affect the right of a company to redeem any shares issued under section 80 or under any corresponding provision in any previous companies law.

This section corresponds to s. 54A of the previous Act and s. 54 of the English Act of 1948. The changes suggested in para. 50 of the C.L.C.'s report have been embodied in the redraft—*Notes on Clauses*.

The C.L.C. observe : "The only important recommendation that we make is that the prohibition imposed by s. 54 of the Indian Companies Act should not apply to the provision of funds by a company for the purchase of, or subscription for, fully paid-up shares by a trustee or trustees for the benefit of employees of the company or to grant loan by the company to its employees for a similar purchase. We, however, suggest that such payment should be subject to the limit of three months' salary of the employees concerned. The object of our recommendation is to enable the purchase of its shares by a company on behalf of and for the benefit of its employees or by the employees themselves up to a limited extent. Section 54 of the English Companies Act, 1948 imposes no such limit on the purchase of a company's shares, but in the circumstances of this country, we have considered it desirable to limit the purchases to three months' salary of the employees. We trust that this provision, if wisely and tactfully implemented, will enable the employees to have a reasonable stake in the affairs of a company and promote the improvement of industrial relations. At the same time, the operation of this provision will have to be carefully watched, in the initial stages, so that the opportunity that it offers to a company for the investment of its funds in its own shares is not abused to the prejudice of the employees. It should be one of the functions of the proposed Central authority to watch developments of this type, and to suggest appropriate action to Government, if when circumstances call for such action"—*C.L.C.R. p. 39*.

This was originally cl. 71 of the Bill. The Joint Committee have made certain alterations therein with the following observations :—"The Committee have substituted for the words 'no company shall have power to buy its own shares or the shares of its holding company' which occur in sub-clause (1) the words 'No company limited by shares and no company limited by guarantee and having a share capital shall have power to buy its own shares'. That a subsidiary cannot be a member of, or hold any shares in, its holding company has been made clear in clause 41 (now s 42) and the exceptions to that rule have also been stated there. It is unnecessary to restate the same proposition in this clause.

"Since the Court has been given power by clause 401 (now s. 402) to permit a

company to purchase the shares of its members in certain circumstances, that clause has also been specified in sub-clause (1) of this clause.

"The Committee think that the employees of a company should be encouraged to purchase shares in the company and have accordingly enhanced the limit set on loans by the company for enabling such purchases to be made from *three months' salary* or wages to *six months' salary* or wages—See sub-clause (3)" (*vide* J.C.R., para 35).

**479. Sub-s. (1). Company cannot buy its own share :—**A company has no power to purchase its own shares by diverting its capital in order to reduce the share capital (1). An agreement between the company and a director debenture holder which was later on ratified by a resolution of the company, whereby the shares held by the company in another company were to be sold and the sale proceeds utilised for paying off the preference shareholders, and the appellants, who were holders of a great number of preference shares, were to be trustees for purposes of carrying out the agreement, it could not be given effect to either by the directors or shareholders, either by alteration of the charter of the company or its articles of association, the purposes of the agreement being illegal (1).

**480. Sub-s. (1) :—**It is not in the English Act. Where in pursuance of an agreement under which a person was appointed *muttsaddi* of a company the latter purchased shares therein and the agreement was repudiated by the company, he was entitled to the return of the cash value of the shares, and such return would not mean a purchase by the company of its shares (2). Where the vendors by mistake were given some excess paid-up shares and they transferred to the chairman of the board of directors of the company the shares upon trust to use or sell them for the benefit of the company, it was held (1) that the chairman held the shares, not for the benefit of the individual shareholders, but for the benefit of the company and that he held them on trust at his discretion to sell them ; (2) the transaction was not made invalid by reason of the transfer having been made to a nominee on trust which involved an obligation on the trustee to vote in respect of the shares as the company might from time to time direct., and (3) the transfer did not offend against any principle laid down by any of the decided cases (3).

Where a company in execution of a money decree attached and purchased its own shares held by the debtor, it was held that this section applied and the sale was a nullity (4). But if the articles provide that the company will have a lien on the shares held by the person indebted to the company, it can sell such share without the intervention of the Court and title of the purchaser will not be affected by any irregularity or invalidity in the proceedings by virtue of the regulations of the company, even where the company obtained a decree for the loan which had become time-barred (4).

The legal incapacity of a limited liability company to purchase its own shares is not dependent upon the fact of the purchase being made either within the territorial limits of the place where the company was incorporated or outside its territorial limits, but it is beyond the scope of its constitution (5).

**481. Sub-s. (2) :—**The construction of this sub-section has to be approached with the observations of Lord Greene, M. R. in *In V. G. M. Holdings, Ltd.* (6) in mind. The section provides merely for the punishment of the offending company and its officers, but does not invalidate a security given in contravention of it, because

(1) *Nand Kishore v. Gaya Sugar Mills Ltd.* [1953] P. 390.

(2) *Ram Chand v. Diamond Flour Mills Co.* 10 P.R. 1905, 100 P.L.R. 1905.

(3) *Kirby v. Wilkins* [1929] 2 Ch. 444.

(4) *Chotanagpur Banking Assn. v. Rajib Nath* [1947] P. 40, 12 B.R. 579, 22 I.C. 224.

(5) *Sabarathnam v. O. L. Travancore N. & Q. Bank* [1943] M. 111, 55 M.L.W. 653.

(6) [1942] Ch. 235 (239).

it does not say that it should not be lawful to provide a security in order to give financial assistance (7).

In a recent English case where an agreement provided that a director and manager of a company should resign and transfer his share-holding in the company to another director for 250 *l.* and this sum was paid to him by a cheque drawn on the company's account, it was held that if the payment for the shares by the company's cheque was such as to contravene s. 45, cl. (1) [corresponding to sub-s. (2) of the present section] of the English Act of 1929 and render the company liable to a fine under sub-s. (3) (which was not proved in the case), the agreement was not thereby rendered invalid (8). The acquisition of shares in a company by application and allotment is not a "purchase" within sub-s. (1) of the English Act which accordingly does not cover a transaction by which a company provides money to assist a subscription for its own shares (9).

**482. *Ultra vires* :—**In the absence of a special power of cancellation or forfeiture of shares, the directors have no power to release shareholders from their liability or to cancel shares (10). A resolution, passed by a company authorizing the money of those shareholders who have not paid their allotment money and are not willing to remain as members to be returned, is *ultra vires* and cannot operate to relieve them of their liability as contributories (10). An article enabling members to sever all connections with the company and end all their liability, being opposed to this section, is *ultra vires* the company and the memorandum of association (11).

**483. Company cannot deal in its own shares :—**A company, even though it be empowered by its memorandum or articles of association to deal in the shares of companies, is not thereby entitled to deal in its own shares, and a purchase by the directors of its shares on behalf of the company is *ultra vires* (12). Directors have no power to cancel shares duly issued to a shareholder at his request and thus to reduce the company's capital (13). Provisions for option for a company to buy its own shares is *ultra vires* under the Acts of 1866, and 1913 as well as under the present Act (14).

### *Issue of Shares at Premium and Discount*

**78. Application of premiums received on issue of shares.—**(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the share premium account"; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company.

(7) *Victor Battery Co. v. Curry's Ltd.* [1946] 147 L.T. 326.

(8) *Spink (Bournemouth) Ltd. v. Spink* [1936] 1 Ch. 544.

(9) *V. G. M. Holdings, Ltd.* [1942] Ch. 235 (C.A.).

(10) *Peoples Industrial Bank v. Jalpa Prasad* [1922] 19 A.L.J. 351, 62 L.C. 450; see also *Phosphate of Lime Co. v. Green* [1871] L.R. 7 C.P. 43.

(11) *Madras N. P. Fund v. Natesa Sastri* [1929] M. 773, 52 Mad. 915.

(12) *Jahangir v. Shamji* [1866] 4 Bom. H.C.R. 185, (O.C.); *Trevor v. Whitworth* (infra).

(13) *Sorabji v. Ishwardas* [1896] 20 Bom. 654.

(14) *Canji v. Colaba Press Co.* [1912] 14 Bom. L.R. 521, 16 L.C. 49.



(2) The share premium account may, notwithstanding anything in sub-section (1), be applied by the company—

(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares ;

(b) in writing off the preliminary expenses of the company ;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company ; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.

(3) Where a company has, before the commencement of this Act, issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act :

Provided that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the share premium account.

This section is new. It corresponds to s. 56 of the English Act of 1948, and is based on the C.L.C.'s recommendation (page 300 of the Report) - *Notes on Clauses*.

The C.L.C. observe : "There is no specific provision in the Act regarding the application of premiums received on the issue of shares with the result that misuse of the funds thus collected has not been lacking. The object of this new section is to lay down specifically how the premiums collected on the issue of shares should be utilised - *C.L.C.R.*, p. 300.

**484.** This section in effect creates a new class of capital not being share capital but not being distributable as income any more than any other capital assets. Therefore the moneys received by the trustees in this case were held to be capital assets (15). Where the company had within the terms of sub-s (1) of this section issued the shares at a premium, it was bound to transfer to the share premium account a sum equal to the aggregate amount or value of the premiums (16).

**79. Power to issue shares at a discount.—(1)** A company shall not issue shares at a discount except as provided in this section.

(2) A company may issue at a discount shares in the

(15) *Re Duff's Settlements Trusts* [1951] 1 A.E.R. 89, affd. by C.A. in [1951] 2 A.E.R. 534.

(16) *Henry Head & Co. v. Ropner Holdings Ltd.* [1951] 2 A.E.R. 994.

company of a class already issued, if the following conditions are fulfilled, namely :—

(i) the issue of the shares at a discount is authorised by a resolution passed by the company in general meeting, and sanctioned by the Court ;

(ii) the resolution specifies the maximum rate of discount (not exceeding ten per cent. or such higher percentage as the Central Government may permit in any special case) at which the shares are to be issued ;

(iii) not less than one year has at the date of the issue elapsed since the date on which the company was entitled to commence business ; and

(iv) the shares to be issued at a discount are issued within two months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(3) Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the Court for an order sanctioning the issue ; and on any such application, the Court, if, having regard to all the circumstances of the case, it thinks proper so to do, may make an order sanctioning the issue on such terms and conditions as it thinks fit.

(4) Every prospectus relating to the issue of the shares shall contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the prospectus.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

This section corresponds to s. 105A of the previous Act and s. 57 of the English Act of 1948. Only a few drafting changes have been made. The provision that the maximum rate of discount should not exceed 10 per cent. is found in the Indian, but not in the English Act. The Indian Act has been followed—*Notes on Clauses*.

This was cl. 73 of the original Bill. The Joint Committee have made some alterations therein with the following observation :—“The new sub-clause (1) has been inserted, restricting the power of a company to issue shares at a discount except as provided in this clause. The Committee consider that a discount higher than ten per cent. should also be allowable in proper cases, but that the permission of the Central Government should be obtained therefore. The clause has been amended accordingly” (*vide* J.C.R., para 36).

**484A.** A company governed by the English Companies Consolidation Act, 1845 and the Acts amending it might issue fully paid up original stock at a discount and for pay-

ment either in cash or for land or labour or other consideration subject to the liability of the directors for issuing the stock below its value without necessity (17).

**485.** A member of a private company was desirous of selling his shares. According to the articles of the company in such an event the shares were to be offered to the other members at a fair value to be fixed by the auditors. The auditors set a value of 14s. 8d. on the £1 shares and W agreed to advance money to D, one of the members, to enable him to effect the purchase of the retiring member's shares on condition that 3,000 unissued shares were allotted to him at the same price. This the company by resolution agreed to do, the purchase was carried out and W was registered as the holder of 3,000 shares. Through an oversight no steps were taken at the time to obtain the sanction of the Court required by s. 47 (2) of the English Act of 1929 (corresponding to the present section), before shares could be issued at a discount. In order to regularize the position the company passed a resolution in general meeting cancelling the purported issue of 3,000 shares to W, and directing the removal of his name from the register. At the same meeting a fresh resolution was passed for the issue of the shares to W at the discount originally intended and a petition was then presented to the Court for sanction to this issue: *Held* that in all the circumstances, the Court would sanction the issue of the shares at a discount, and in view of the fact that the matter must inevitably have come before the Court for sanction, the rectification of the register without any motion to the Court would be accepted as valid (18).

### *Redeemable Preference Shares*

#### **80. Power to issue redeemable preference shares.—**

(1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed:

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) the premium, if any, payable on redemption shall have been provided for out of the profits of the company or out of the company's share premium account, before the shares are redeemed;

(d) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividend, be transferred to a reserve fund, to be called

(17) *Webb v. Shropshire Rys. Co.* [1893] 3 Ch. 307.

(18) *Derham & Allen, Ltd.* [1946] 1 Ch. 31, 173 L.T. 281.

“the capital redemption reserve fund”, a sum equal to the nominal amount of the shares redeemed ; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company.

(2) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(3) The redemption of preference shares under this section by a company shall not be taken as reducing the amount of its authorised share capital.

(4) Where in pursuance of this section, a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued ; and accordingly the share capital of the company shall not, for the purpose of calculating the fees payable under section 601, be deemed to be increased by the issue of shares in pursuance of this sub-section :

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) The capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

(6) If a company fails to comply with the provisions of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

This section corresponds to s. 105B of the previous Act and s. 58 of the English Act of 1948. As suggested by the C.L.C.R. page 300 the penal provisions have been extended to the whole section, and the provision in sub-s. (3) of s. 58 of the English Act has been embodied in sub-s.(3) of this section- *Notes on Clauses.*

This was originally cl. 74 of the Bill. The Joint Committee have made certain changes therein with the following observation : “The intention of this clause is to provide for the redemption of redeemable preference shares issued by a company either out of its profits or out capital specially raised for the purpose and not from

the sale proceeds of other property of the company. The retention of the words "or out of the sale proceeds of any property of the company" would enable a company to redeem the shares practically at will. The words have therefore been deleted from sub-clause (1) (a)" (*vide* J.C.R., para 37).

**486.** The conversion of preference shares already issued into irredeemable preference shares is not an "issue" of shares within the meaning of this section (19).

**487.** A company sought the Court's sanction to a scheme of arrangement which included a provision for the conversion of its preference shares into redeemable preference shares : *Held*, that s. 46 of the English Act of 1929 (corresponding to the present section) did not authorize the conversion of issued preference shares into redeemable preference shares. Such conversion could only be effected, if appropriate steps were taken for the reduction of the company's capital by the cancellation of the issued preference shares and for the simultaneous increase of the capital by the creation of redeemable preference shares (20).

The capital of a company consisted of 210,000 *l.* divided into 110,000 seven per cent. redeemable preference shares of 1 *l.* each, fully paid up. After 24,500 of the preference shares had been redeemed, the company presented a petition for the sanction of the Court of the reduction of the capital to 100,000 *l.* consisting of 100,000 ordinary shares of 1 *l.* each by the extinction of the remaining shares : *Held*, that having regard to sub-s. (4) of s. 46 of the English Act of 1929 [corresponding to sub-s. (4) of the present section] the preference shares on the redemption ceased to form part not only of the issued and paid up capital, but also of the nominal capital of the company (21).

### *Further issue of Capital*

**81. Further issue of capital.**—(1) Where at any time subsequent to the first allotment of shares in a company, it is proposed to increase the subscribed capital of the company by the issue of new shares, then, subject to any directions to the contrary which may be given by the company in general meeting, and subject only to those directions—

(a) such new shares shall be offered to the persons who, at the date of the offer, are holders of the equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid up on those shares at that date ;

(b) the offer aforesaid shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days from the date of the offer within which the offer, if not accepted, will be deemed to have been declined ;

(c) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right

(19) *St. James' Court Estate, Ltd.* [1943] 112 L.J. Ch. 193.

(20) *St. James' Court Estate, Ltd.* [1944] 170 L.T. 179.

(21) *Serpell & Co. Ltd.* [1944] 1 Ch. 233, 170 L.T. 335.

exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person ; and the notice referred to in clause (b) shall contain a statement of this right ;

(d) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of directors may dispose of them in such manner as they think most beneficial to the company.

*Explanation.*—In this sub-section, “equity share capital” and “equity shares” have the same meaning as in section 85.

(2) Nothing in clause (c) of sub-section (1) shall be deemed—

(a) to extend the time within which the offer should be accepted, or

(b) to authorise any person to exercise the right of renunciation for a second time, on the ground that the person in whose favour the renunciation was first made has declined to take the shares comprised in the renunciation.

(3) This section shall not apply to a private company.

This section corresponds to s. 105C of the previous Act, and is based on the redraft of that section by the C.L.C. at p. 399 of their Report—No change of substance has been made. An endeavour has been made to bring out the intention as clearly as possible—*Notes on Clauses*. This was originally cl. 75 of the Bill. The Joint Committee have made certain alterations therein with the following remarks :—“Sub-clause (1) has been redrafted so as to bring out the meaning clearly. The period of ten days provided in this clause for accepting an offer to take up further shares has been increased to fifteen days” (*vide* J.C.R., para 38).

In para 52 of their Report the C.L.C. observes :—“S. 105C of the previous Act ‘has been a prolific source of trouble since its insertion by the Indian Companies (Amendment) Act, 1936. In order to resolve conflicting judicial decisions (*vide* *Nanlal Zaver v. Bombay Life Assurance Co.* (1950) S. C. 172 on appeal from (1949) B 56, 50 Bom. L. R. 413) and to clarify the intentions of the legislature, as we understand them, we propose that this section should be concerned with all increases in the subscribed capital of a company after the first allotment has been made.” “Under the existing section, when it applies, new shares have to be offered to all shareholders irrespective of class. We consider it obviously unfair that holders of preference shares should automatically obtain privileges where further capital is to be issued, and our recommendation restricts the right of taking up further shares to the holders of the equity capital in the company, as defined by us in our redraft of section 105C (item 21 in the Addendum) unless the company in general meeting sanctioning the issue decides to the contrary.”

**Equity of shares** :—For meaning of “equity shares”, see s. 85 and notes.

**488. Object and scope** :—The object of this section is to prevent discrimination amongst shareholders and prevent the directors from offering shares to outsiders before they are offered to the shareholders. So long as these two requirements are complied with, the action of the directors in selecting the time when they will issue the shares as also the proportion in which they should be issued is a matter left to their discretion and it is not the province of the Court to interfere with the exercise of that discretion. This is of course subject to the general exception that the directors are not to act against the interest of the company or *mala fide* (22).

In the last cited case in fixing the ratio of the shares offered to the existing shareholders some 272 shares remained outside the offer ; but in whatever other proportion the shares were offered, still a few shares were bound to remain unoffered : *Held* that on construction of the section the directors had not committed any breach of the terms of this section.

S. 105C of the previous Act was not a mere reproduction of reg. 42 of Table A of that Act. The word capital in that section meant the subscribed capital. Therefore it was obligatory to the directors to offer the further shares to the existing shareholders before allotting them to any other person. If they were not so offered, their allotment to others would be irregular and invalid (23).

**489. Position of directors** :—It is well established that the directors are in a fiduciary position *vis à vis* the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company, but *simply and solely* for their personal aggrandisement and to the detriment of the company, the Court will interfere and prevent the directors from doing so. If the directors exercise the power for the benefit of the company and at the same time they have a subsidiary motive which in no way affects the company or its interests or the existing shareholders, then the very basis of interference of the Court is absent (22).

Where a company being in need of funds its directors decided to issue further shares and in doing so they also had another motive, namely, to prevent a certain group, who were strangers to the company, from intruding into its affairs so as to be able to assume a controlling hand in the management for their own purposes rather than for the benefit of the company, it was *held* (i) that the conduct of the directors could not be judged on the basis of any assumed fiduciary relationship between them and the group, that the directors owed no duty to the group and therefore the motive to exclude the group could not be said to be *mala fide* ; (ii) that assuming that the motive to exclude the group was a bad motive, it did not prejudicially affect the company or the existing shareholders, and the presence of such further motive could not vitiate the good motive of finding the necessary funds for the company ; and (iii) that therefore the issue of further shares was *bona fide* and not illegal or void (22).

**490. Further shares** :—The object of section 105C of the old Act appears to be to make the salient provisions of reg. 42 in Table A of the old Act compulsory. The section as drafted was liable to the construction that whenever the directors decided to increase the capital of the company by the issue of further shares, even if it was a part of the authorised capital, the new shares must be first offered to the existing shareholders. But the aforesaid section should be read in conjunction with cl. (a) of s. 50 of the old Act under sub s. (2) of which the directors had no power to increase the share capital of the company. Therefore it seems that the words "further shares" meant shares beyond the authorised capital of the company. This

(22) *Nanatal Zaver v. Bombay Life Assurance Co.* [1950] S.C. 172 on appeal from [1949] B. 56, 50 Bom. L.R. 413.

(23) *Pritam Singh v. Kotkapura Bus Syndicate* [1953] N.U.C. 2501 (Pepsu).

view is supported by the following observation in Sircar & Sen's Companies Act at p. 309 : "The words 'further shares' must be read in connection with the words 'decide to increase the capital of the company'. They must mean shares which are issued for the purpose of increasing the capital beyond the authorized capital."

The question whether the old section 105C dealt with the case of an increase of capital beyond or within the authorised limit was recently raised in the Supreme Court of India in the case noted below (22). The majority of their Lordships did not express any definite opinion on it. The learned Chief Justice said : "In view of my conclusion on the third point it is not necessary to express any opinion" on the point. Mr. Justice Mahajan after quoting the opinion of the author of this book, as expressed in the last paragraph, observed as follows : "The expression 'capital of a company' is an ambiguous phrase and may mean issued capital or authorised capital according to the context. It has been used in different senses in various parts of the Act. In what sense it has been used in the section is by no means an easy matter to decide, particularly in view of the fact that inspite of the introduction of this section in the Companies Act in the year 1936, Article 42 still remains as one of the articles to be adopted by companies if they do not choose otherwise and this refers to cases of increase in the nominal capital of a company. In my opinion for the purpose of deciding the present case it is not necessary to pronounce on the question as to the precise scope of the section because I consider that on any interpretation of it the appellant's contention has to be negatived" (24). Mr. Justice Das however held that the learned Attorney General's contention that this section should be construed in the light of Regulation 42 in Table A (of the old Act) could not be accepted (25).

There might, it is submitted, arise practical difficulties if the provisions of the section were applied to the case of directors issuing further shares within the limit of the authorised capital. Companies are generally floated by registering the memorandum of association with seven shareholders, each subscribing for a few shares only and often one share each. As they become members upon registration of their names in the share register [*vide* s. 41 (1)] the shares will be deemed to have been issued to them. After this when further shares are issued by the directors they will first have to be offered to the seven subscribers ; and every time shares are issued within the limits of the authorised capital, and they are often issued in dribbles, they will have to be offered to the previous shareholders. In view of this and the difficulties felt by their Lordships of the Supreme Court in interpreting this ill-drafted section, the legislature has attempted to amend it, but with questionable success.

See Note 533A under s. 94 *post*.

**491. Specific performance :—**Where new shares issued by the company were duly applied for and allotted and in the notification for allotment new conditions were stated, it was held that specific performance of the agreement to take shares could not be decreed (26).

**492. Declaratory suit :—**A suit by a shareholder for a declaration that the allotment of new shares to certain persons is not legal and the allottees have no power as shareholders on the ground that the resolution authorizing the increase of capital by issuing new shares was invalid and ineffective does not lie, if no consequential relief such as a prayer for rectification of the register of members by removing the names of the new shareholders or for an injunction is sought (27).

(22) Nanalal Zaver v. Bombay Life Assu. Co. [1950] S.C. 172 at p. 177.

(25) *Ibid* at p. 187.

(26) Oriental Inland Steam Co. v. Briggs [1861] 31 L.J., Ch. 241.

(27) Jogesh v. Durga Mohan [1932] C. 714, 36 C.W.N. 638, 140 IC. 76.



**493. "Members":**—The word "members" includes the legal representatives of members who die between the date of the sanction of the increase of capital and the date of the offer (28). As to how the offer should be made see the last cited case at p. 456 of the same.

**494. Right of transferee of shares :—**When a company resolves to issue new shares, if an existing shareholder were to apply for his quota of the new shares in respect of shares which he has already sold, he would be a trustee for his purchaser. In the case of his executing a letter of renunciation, the position would be different where the directors reserve the right to accept or refuse any application for shares made by a person in whose favour the shareholder might renounce his right to the new shares. In such a case the purchaser's right would by no means be so certain and positive. The more substantive and positive right would be actually to obtain the shares and to hold them as trustee for the purchaser (29).

The statutory right of the existing shareholder to acquire the new shares continues till the time limited has expired and that right can only be lost if he declines to accept the shares prior to the expiry of the time limit. This statutory right does not expire when the shareholder acquires only part of the new shares but continues till the time limited by the notice. The shareholder who has sold his shares but is still on the register of the company becomes a trustee for the purchaser as regards new shares not applied for by him (29).

In the last cited case the existing shareholder accepted new shares in respect of those which he still held and declined to accept them in respect of shares which he had sold, even upon a requisition by the purchaser. Thereupon the purchaser filed a suit, a Court Receiver was appointed who called upon the company to allot to him the shares in question and to put his name on the register of shareholders : *Held* that the Receiver could not apply to be registered as a holder of the new shares in his own name. Under s. 33 (of the old Act) the company was not bound to take notice of any trust, express, implied or constructive. The Court could not look upon the application by the Receiver as having been made on behalf of the shareholder. It was also held that in this suit the Court could not order the company to put the name of the shareholder in respect of those shares which he had declined to take and then direct to transfer them to the Receiver, because, an important right had accrued to the company and that right was that on the expiry of the time limit, the company was entitled to dispose of the shares not applied for in such manner as it thought most beneficial to the company.

**495. :—**This section limits the powers of directors to dispose of the further issue of capital in any manner, they may think most beneficial to the company. They are under a mandate to offer those shares in the first instance to the members in proportion to their existing shares. Thus a member becomes entitled to obtain shares in the further issue of shares as of right (30). A transferor of shares, the beneficial interest of which vests in the *cestui que trust* (the transferee) is not liable for all the payments and obligations attaching to the new issue of shares. He is not under a duty, when so instructed by the beneficiary, to make an application for the new issue of shares and obtain them in his name by making the necessary payments and by incurring the consequential new obligations (30).

(28) *James v. Buena Ventura Syndicate* [1896] 1 Ch. 456.

(29) *Venkat Rama Reddy v. Padampat* [1950] B. 76, 51 Bom. I.R. 529.

(30) *Mathalone v. Bombay Life Assc. Co.* [1953] S.C. 385.

## PART IV

### SHARE CAPITAL AND DEBENTURES

#### *Nature, Numbering and Certificate of Shares*

**82. Nature of shares.**—The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.

This section corresponds to s. 28 (1) of the previous Act and s. 73 of the English Act of 1948—*Notes on Clauses*.

**496. Meaning of "share" :—**"Share" means share in the share capital of the company and includes stock except when a distinction between stock and shares is expressed or implied (31). A share is not a sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract (32). Shares are "goods" within the meaning of s. 76 of the Indian Contract Act (33). Under the English Law a share is regarded as a chose in action (34). But in India it is not so. S. 137 of the Transfer of Property Act (Avt IV of 1882) excepts the applicability of the Chapter dealing with transfer of actionable claims to stocks and shares, and in the present section as well as in s. 2 (7) of the Sale of Goods Act (Act III of 1930) shares have been defined as constituting movable property, and are goods within the latter Act (35). See notes to s. 2 (46).

Shares in a limited company cannot be the subject of a valid *wakf* (36).

**496A. Nature of shares :—**Shares are movable property in India and they can be transferred in the manner provided in the articles of the company (subject of course to the provisions ss. 108, 110 and 111—Author) (37). But "It is a mistake" says Chakravarti, C.J., "to suppose that a share is a movable property in the sense of a garment or an article of furniture. As I have pointed out, it is linked up with the company of which it is a share, in a peculiar manner" (38).

**497. Issue of shares :—**"In *Bush's* case (39) the issue of the certificate of shares was merely taken as evidence of the time when the shares were issued, but must not be taken to mean that shares are not issued until the certificates are issued" (40).

**498. Meaning of "transfer." Transferable :—**"Transfer" means transfer by the acts of a member, while "transmission" means transmission by devolution of law e.g., by death or bankruptcy (41). The articles of association of most companies

(31) S. 2 (46).

(32) Per Farwell J. in *Borland's Trustee v. Steel Bros. & Co.* [1901] 1 Ch. 279, 288.

(33) *Manekji v. Wadilal Sarabhai & Co.* [1926] 53 I.A. 92, 50 Bom. 360, 30 C.W.N. 890; *Evans v. Davies* [1893] 2 Ch. 216; see also *Hazari Mull v. Satish* [1918] 46 Cal. 331; *Fazal v. Mangaldas* [1921] 46 Bom. 489.

(34) *Harold v. Plenty* [1901] 2 Ch. 314.

(35) *Kaunambra v. Krishna* [1943] M.74, [1942] 2 M.L.J. 120, [1942] M.W.N. 450; *Kunhuni Elaya v. Krishna Pattar* [1943] M. 74, (1943) Mad. 115; *Rup Chand v. Kamal Kumari* [1955] N.U.C. 348 (Cal).

(36) *Bai Fatima v. Gulam Hussian* [1907] 9 Bom. L.R. 1337.

(37) *Arjun Prasad v. Central Bank of India* [1956] Pat. 32, 34 Pat. 8.

(38) *Hindusthan Investment Corpn. v. Comr. of Income-tax* (1955) C. 432 at p. 437.

(39) [1874] 9 Ch. App. 554.

(40) *Blythe's case* [1876] 4 Ch. D. 140 at p. 142—per Brett J.

(41) *Bentham Mills Spinning Co.* [1879] 11 Ch. D. 900 (C.A.); *Barton v. London & N. W. Ry. Co.* [1889] 24 Q.B.D. 77 (C.A.).

contain some restriction on the right of transfer (42). There seems to be no limit to the restriction that may be so imposed (43). Any condition precedent to transfer, such as obtaining consent of the directors (44), or giving the members an opportunity to purchase (45) even at a price much below their real value (46), is valid. The restrictive provisions are, however, strictly construed (47). "Shares," says Lord Wrenbury, "are *prima facie* transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to . . . A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid" (48). Shares in the capital of a company, not being negotiable instruments, are not capable of passing by delivery as is required in the case of a movable property : hence the delivery of share certificates, though accompanied by words of gift, does not alone create a gift *inter vivos* (49).

**499. Right of transfer :—**A shareholder, whether in a public or a private company, has property in his shares which he has a right to dispose of subject only to any express restriction in the articles (50). In such a case the transfer cannot take effect without the sanction of the company (51). In the absence of such restrictions, the shareholder has, by virtue of this section, the right to transfer his shares to any person, even to a pauper (52), or even if the transfer is made to escape liability of the member (53), provided that the transfer is real and *bona fide* (52), without retaining by the transferor any interest in the shares (54). Directors are entitled to a reasonable time for considering the transfer, before declining registration (55).

A member may transfer his shares to a person who is incapable of paying the unpaid call, even if the transfer is made for the express purpose of relieving the former from liability (51). But this right may be restricted by the articles (56). The directors may refuse to register a *bona fide* transfer to an infant, because the latter cannot accept it (57). If a shareholder effects a sale of his shares which in law is void because it is in favour of a person who is under a legal incapacity to purchase, he does not cease to be the legal owner and he remains on the register, and so long he is there, he is subject to the liabilities attaching to his membership (58). Where a person transferred his shares to an infant who was registered in his place, the original share certificate was cancelled and a new one issued in the transferee's name, and afterwards the company gave the transferor notice of call,

(42) Vide Table A, regulations 21 and 22.

(43) Cawley & Co. [1889] 42 Ch. D. 209, 231.

(44) Dublin N. C. Milling Co. [1909] I.R. 179.

(45) Ontario Jockey Club v. Mc Bridge [1927] A.C. 916 (P.C.), [1928] P.C. 291 ; A.—G. v. Jameson [1904] 2 I.R. 614.

(46) Phillips v. Manufacturers Securities [1917] 116 L.T. 290, 31 T.L.R. 451.

(47) Exp. Harrison [1885] 28 Ch. D. 363 (C.A.).

(48) Ontario Jockey Club v. Mc Bridge (supra) at p. 293.

(49) O'meara v. Benev [1921] P.C. 190.

(50) Copal Varnish Co [1917] 2 Ch. 349 ; Bede Steam Shipping Co. [1917] 1 Ch. 123 ; Swan Mal v. Shiv Charan [1923] 71 I.C. 814 ; Thenappa v. Indian Overseas Bank [1943] M. 743, [1943] 2 M.L.J. 201.

(51) Devi Datta v. Standard Bank [1927] L. 797, 101 I.C. 568.

(52) Lindlar's case [1910] 1 Ch. 207 & 312. In this case the whole subject of the validity of transfers for escaping liability has been discussed.

(53) De Pass' case [1859] 4 De G. & J. 544.

(54) Hyam's case [1850] 1 De G. F. & J. 75.

(55) Ottos Kopje Diamond Mines [1893] 1 Ch. 618.

(56) A. G. v. Jameson (supra).

(57) R. v. Midland & Ry. Co. [1862] 15 I.C.L.R. 514.

(58) Sabarathnam v. O. L. Travancore N. & Q. Bank [1943] M. 111, 55 M.L.W. 653.

it was held that the transfer to an infant was invalid and that the transferor should be placed on the list of contributories (59).

Shares having been transferred to purchasers without notice that they were not fully paid up and being registered in the books of the company as paid up shares, they must, as between the company and the transferees, be treated as fully paid up shares, and the beneficiaries could give a good title to purchasers from them whether with or without notice (60).

**500. Directors' power to refuse registration :—**Even in a case where the power to refuse registration of transfer is conferred on the directors in absolute terms, the refusal must not be arbitrary (61). Where the articles give an unfettered discretion to the directors to refuse any transfer if it appear to be against the interest of the company, the burden of proving that the refusal was not *bona fide* is upon the person who sues the company for non-registration of the transfer (62). If the directors *bona fide* exercise their discretion to refuse the registration of a transfer within the powers conferred on them, the Court will not override their decision or compel them to state their reasons (63). But where there is evidence to show that the directors have exercised the powers capriciously or unfairly, the Court has jurisdiction to interfere under s. 155 (63). The rule that the directors are not bound to disclose their reasons, if they have considered the question and have acted *bona fide*, applies to cases where their power is limited to particular grounds as well as where their power is absolute (64). But if they choose to give their reasons, the Court will then consider whether they are legitimate (65) and whether the reasons given by the directors proceeded on a right principle. Objections not personal to the transferee do not constitute valid reasons (66). The directors however have no discretionary powers independently of the powers conferred on them by the articles to refuse registration of transfer which has been *bona fide* made (67). Where registration of a transfer is wrongly refused, the measure of damages is the value of the shares at the time of the refusal (68). "The shares are," observed Sir W. Page-Wood J., "transferable by virtue of the statute, and that the province of the articles is to point the mode in which they shall be transferred, and the limitations (if any) to which a shareholder shall be subjected before he can transfer" (69). Where no objection is raised of a personal kind against the person seeking transfer on whom the shares have devolved by operation of law, to recognize a power in the directors to refuse registration of the transfer is to countenance an abuse of powers vested in them (70). Under s. 381 of the Succession Act, 1925 a succession certificate gives a good title to the grantee thereof; so in the last cited case the grantee was held entitled to have the shares transferred in his name and also to damages against the company.

(59) Capper's case [1868] 3 Ch. App. 458.

(60) Staffordshire Colliery Co. [1879] 14 Ch. D. 432.

(61) Thenappa v. Indian Overseas Bank, *infra*.

(62) Sri Tripura Sundari Cotton Press Co. v. Addepalli [1935] M. 784. 69 M.L.J. 239. 158 I.C. 601.

(63) Ex. p. Penny [1873] 8 Ch. App. 446; Thenappa v. Indian Overseas Bank [1943] 2 M.L.J. 201, [1943] M. 743.

(64) Coalport China Co. [1895] 2 Ch. 404; Muir Mills Co. v. Condon [1900] 22 All. 410. In this case a large number of English decisions have been considered.

(65) Bell Brothers [1891] 65 L.T. 245.

(66) Muir Mills Co. v. Condon (*supra*). See also Coalport China Co., *supra*; Kai-khasro v. Coorla Spinning & Weaving Co. [1891] 16 Bom. 80; Moffat v. Farquhar [1877] 7 Ch. D. 591; Poole v. Middleton [1861] 29 Beav. 646, 650; Thenappa v. Indian Overseas Bank *supra*.

(67) Weston's case [1868] 4 Ch. App. 20.

(68) Ottos Kopje Diamond Mines [1893] 1 Ch. 618.

(69) Weston's case (*supra*) at p. 26.

(70) Thenappa v. Indian Overseas Bank, *supra*.

Where the articles provide that the sanction of the board of directors will be required for effecting a transfer, but they would not be bound to assign any reason for withholding the sanction, the transferee's title will not be complete without the sanction (71). A letter of renunciation by any existing shareholder in favour of his nominee of his right to an allotment of new shares is not however such a transfer (72).

Where the articles provide that transfers are subject to the approval of the directors, they cannot exercise the power, which is a fiduciary one for the benefit of the company, until the question of each transfer together with the names of the transferors and the transferees is before them and they have an opportunity of considering each case (73) fairly (74). The Court will interfere where the directors do not exercise their discretion *bona fide* or they act oppressively, capriciously or corruptly or in some way *mala fide* (75).

**500A. Position of unregistered transferee of shares :—**"It is true," says Chakravarti C.J., "that under s. 28, (old) Companies Act, shares are transferable in the manner provided by the Articles of a Company, but Regulation 18 of Table A (of the old Act) provides that while shares can be transferred by an instrument of transfer and no deed is required, 'the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof'. It therefore follows that an unregistered transferee of shares is not a holder of the shares in the eye of the company and it will not and cannot pay dividends to him and does not make any deduction from any dividend paid to him or pay any tax on his behalf. It is wholly immaterial that a transferee of shares is entitled to fill in his own name and obtain registration of himself as the holder of the shares. Till he has done so, he has no right as against the company and the company does not deal with him" (76).

**501. Transferor whether trustee :—**Where a person purchases shares in a company, and after receiving his vendor's share certificate and transfer form applies for transfer of the shares in the company's register to the names of his nominees, but the directors acting within their powers refuse to accept the transfer, the transferor is in the position of a trustee of the shares for the purchaser under s. 94 of the Trusts Act (Act II of 1882) and the transferor must comply with all reasonable directions given to him by the transferor, e.g., in the matter of giving votes &c., and the transferor must give the dividends &c. to the transferee as they accrue (77). The purchaser is entitled to a mandatory injunction enjoining the transferor to sign a proxy to the transferee (77). The transferor is also a trustee with regard to any other rights that may attach to the shares. In respect of any accretion to the shares by way of bonus or any right which the company may confer upon the holder of shares which he has sold, the transferor is in law constituted a trustee for his *cestui que trust*, the purchaser (78). Where a person sold his shares, but his name remained on the register, the purchaser was not estopped from setting up that he was the person beneficially interested (79). But see *Anarendra v. Manimunjari* (80) where it has been held that such a transfer does not operate as a declaration of trust.

(71) Ex. p. Gilbert [1891] 16 Bom. 398.

(72) Poole Shipping Co. [1920] 1 Ch. 251.

(73) Ex. p. Ramdas [1899] 23 Bom. 685.

(74) Kaikhosro v. Coorla Spinning & Weaving Co. [1891] 16 Bom. 80.

(75) Bell Brothers (supra).

(76) Hindusthan Investment Corpn. v. Comr. of Income-tax (1955) C. 432 at p. 436.

(77) E. D. Sassoon & Co. v. Patch [1922] 45 Bom. L.R. 46; Stevenson v. Wilson [1907] S.C. 445 (Ct. of Sess); Venkat Rama Reddy v. Padampat, [1950] B. 76. 51 Bom. L.R. 529.

(78) Venkat Rama Reddy v. Padampat, supra.

(79) Howard v. Sadler [1893] 1 Q.B. 1.

(80) [1921] 48 Cal. 986.

**502. Liability of transferee :—**A person who executes a transfer form remains liable unless and until there is on the register a transferee who is legally liable to the company. The company, or the liquidator where the company has gone into liquidation, is not concerned with the persons paying the consideration for the shares (81). Till the name of the purchaser of the shares is registered as the holder thereof, the original holder is liable for calls made on them after the sale (82). Once a person's name is put on the register of members in respect of certain shares, they remain the shares of the person who took them and the position cannot be altered except by some valid transfer (83).

**503. Implied contract to indemnify :—**Upon a sale of shares there is an implied contract on the part of the buyer to indemnify the seller from any future call or other liabilities except the statutory one (84). But the seller does not warrant that the company will accept the transferee (85); for it is the duty of the transferee to get himself registered (86). It does not however follow that a sale can take place even without registration (87). If the purchaser desires to protect himself, he should buy with "registration guaranteed;" otherwise the vendor can keep the purchase money, even if the transfer is not registered (88). Where the shares were not registered in the name of the transferor, there is however a failure of consideration (89). Where the purchaser had not executed the transfer, but had not definitely repudiated the authority given to his agent to purchase the shares, the former became equitable owner of the shares and was held bound to indemnify the vendor against all loss and liability in respect of them (90).

Under a contract for the sale of shares, the measure of damages upon a breach by the buyer is the difference between the contract price and the market price *at the date of the breach* (91). "It is undoubted law," observed their Lordships of the Judicial Committee "that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it." (92).

**504. Transfer—how effected :** The deed of transfer should be signed both by the transferor and the transferee (93); for if the transferee does not sign it or otherwise agrees to become a shareholder, the transfer will not be effectual to fasten any liability on the transferee, even if the transfer is registered by the directors (94). In such a case the transfer executed by the transferor alone does not pass legal title

(81) Peninsular Life Assurance Co. [1936] B. 21, 37 Bom. L.R. 904, 160 I.C. 638.

(82) Midland G. W. Ry. Co. v. Gordon [1847] 16 M. & W. 804.

(83) Per Lord Romilly, M. R. in *Merchant's Co.* [1869] 9 Eq. 5, 7; see also *Nicol's case* [1885] 29 Ch. D. 421, 434; Buckley, 10th ed. p. 591.

(84) *Hardoon v. Belilios* [1901] A.C. 118 (P.C.); *Spencer v. Ashworth, Partington & Co.* [1925] 1 K.B. 589 (C.A.); *Kellock v. Euthoven* [1874] L.R. 9 Q.B. 241.

(85) *London Founders' Assn. v. Clarke* (infra).

(86) *Skinner v. City of London & Co. Corpn.* [1885] 14 Q.B.D. 882; *London Founders' Assn. v. Clarke* [1888] 20 Q.B.D. 576; *Muir Mills & Co. v. Condon* [1900] 22 All. 410; *Bahadur v. Shiam* [1914] 36 All. 365.

(87) *Domingo v. D' Souza* [1928] 26 A.L.J. 627.

(88) *London Founders' Assn. v. Clarke* (supra).

(89) *Platt v. Rowe* [1909] 26 T.L.R. 49.

(90) *Loring v. Davis* [1886] 32 Ch. D. 623.

(91) *Jamal v. Moola Dawood, Sons & Co.* [1915] 43 I.A. 6 at p. 10, 43 Cal. 493, 502.

(92) *Ibid.*

(93) See sub-s. (1) of s. 108.

(94) *Powell v. London & P. Bank* [1893] 2 Ch. 555.

(95). But if the transfer has been acted upon or recognized by the transferee, it will be effectual (95). The object of requiring the transferee to execute the transfer is to satisfy the company that he agreed to take the share (96). A registered transfer is however presumed *prima facie* to have been accepted by the transferee, even where he has not executed the instrument of transfer (97). Where C had money in the hands of a bankrupt which the latter had undertaken to invest, and having got the shares he purported to transfer them to her as purchased with her money and kept the shares in the box and absconded, it was held that the shares were the property of C though the transfer was not executed by her (98).

Shares in the capital of a company not being negotiable instruments are not capable of passing by delivery; hence the delivery of the share certificate, though accompanied by words of gift, does not alone create a gift *inter vivos* (99). "If the gift by delivery of the shares," observed Lord Buckmaster, "were good, the change of name in the register would not have added to its effect" (1).

A seller of shares is bound, if the contract fixes no date, to deliver the certificate within a reasonable time (2). A contract for the sale of shares may be made orally (3), and specific performance of such a contract (4) may be obtained, even though the company, pending the litigation, has gone into liquidation (5).

On the purchase of shares the obligation to prepare the instrument of transfer is as a general rule, on the purchaser (6). The instrument must be in accordance with the articles and be executed in manner prescribed therein; as for instance, if the articles require (as in reg. 19 of Table A) that the instrument shall be executed both by the transferor and the transferee, the omission of execution by the latter invalidates the transfer (7). But the omission of particulars known to the directors will not invalidate a transfer (8).

Where the transfer is lodged with the company and it goes into liquidation before the transfer is registered, the transfer will be registered *nunc pro tunc*, i.e., as if it had been registered when the registration ought to have been made (9).

**505. Effect of transfer. Right to dividend:—**Where a person, who is on the register of shareholders, purports to transfer his share, what he transfers includes the right to get on the register and to become a member in his stead (10). Upon a transfer all the rights and obligations of the member in respect of the shares are transferred from the date of the transfer; but his rights to dividends etc. already declared are not transferred unless expressly so provided, nor are the liabilities in respect of calls already made; but the rights to future dividends and liabilities in respect of future calls are transferred (11). If the transfer is preceded by a contract,

(95) *Ortigosa v. Brown, Janson & Co.* [1878] 38 L.T. 145.

(96) *Taurine & Co* [1883] 25 Ch. D. 118, per Cotton L.J. at p. 133. See also s. 41 and notes.

(97) *Standing v. Bowling* [1886] 31 Ch. D. 282.

(98) *Brown v. Coats* [1801] 64 L.T. 476. But see now s. 108, sub-s. (1) which requires the transfer to be executed by the transferee as well.

(99) *O'meara v. Benet* [1921] P.C. 190.

(1) *Ibid* at p. 192.

(2) *D. Waal v. Adler* [1887] 12 App. Cas. 141.

(3) *Watson v. Spratley* [1854] 10 Ex. 222, 24 L.J. Ex. 53.

(4) *Poole v. Middleton* [1861] 29 Beav. 646.

(5) *Paine v. Hutchinson* [1868] 3 Ch. App. 388.

(6) *Birkett v. Cowper-Coles* [1919] 35 T.L.R. 298.

(7) *Nagabhusanam v. Ramchandra* [1922] 45 Mad. 537. See now s. 108 (1).

(8) *Barned's Banking Co.* [1867] 3 Ch. App. 105; *Letheby v. Christopher* [1904] 1 Ch. 815.

(9) *Sussex Brick Co.* [1904] 1 Ch. 598.

(10) *Sabaratham v. O. L. Travancore N. & Q. Bank* [1943] M. 111, 55 M.L.W. 658

(11) *Per Lindley, L. J.* in *Taylor, Phillips & Rickard's case* [1897] 1 Ch. 298 & 305.

the purchaser will be entitled to dividends declared after the contract (12). Ordinarily, and in the absence of a contract to the contrary, a purchaser of shares is entitled to all the dividends which may have been declared after the date of the purchase. The general rule however may be modified by special stipulations (13). "There is nothing in law," observed Sen, J. in the last cited case, "to preclude a shareholder from selling the shares only and reserving the dividends to himself. Where shares are sold, no matter whether by private treaty or by public sale, and it is definitely understood that the shares and not the dividends on the shares are the subject of bargain, the purchaser cannot deprive the original owner of his right to the dividend of a period anterior to the sale, even though the dividend may have been declared subsequent to the date of the purchase" (13). But in a recent English case Morton J. has held that in a sale by private bargain (not governed by the Stock Exchange Rules as to sale *cum* dividend) of shares, between days on which dividends are declared, the purchaser buys the shares with all the rights which they confer in respect of the company's capital and in respect of profits up to the date of sale. Thus a dividend payable on the declaration next following such a sale is not apportionable, and goes entirely to the purchaser (14). In transactions on the stock exchange made near the time of the declaration of dividend, the sale is generally expressed in the contract as *ex div.* or *cum div.*, usually written *x. d.* and *c. d.* A slight delay in according sanction to a transfer will justify a payment of dividends to a person not yet entered on the register as a member, and such a delay will not make the company liable to an action for damages (15). Until the transferee's name is entered in the register of members, the dividends on the shares are payable to the transferor, for he is deemed to be the holder of the shares until the entry is made (16).

**506. Effect of non-compliance with rules :—**Non-compliance with the rules of a company for the complete transfer of shares prevents the shares from legally vesting in the transferee, though belonging to him in equity (17). Such a transfer does not absolve the transferor from his liability as a contributory (17). If the articles require a transfer to be made by a deed under seal, a blank transfer cannot be filled in without a power of attorney (18), nor are the directors at liberty to dispense with the formality (19). But if the formalities have been substantially complied with and the transferee accepted as a shareholder, then after a lapse of time the transfer cannot be impeached (20).

**507. Registration of transfer :—**A shareholder cannot insist on registration of a transfer on the eve of liquidation, nor if the rights of creditors have intervened, although a winding up has not commenced (21). Where a company has become insolvent, the directors should refuse registration of transfers although the company has not actually gone into liquidation (22). A company was not bound to send notice

(12) *Black v. Homersham* [1878] 4 Ex. D. 24, 39 L.T. 671.

(13) *Co-operative Co. v. Bhagwan Das* [1930] A. 615, [1930] A.L.J. 1936, 128 I.C. 229.

(14) *Richards v. Wimbush* [1940] Ch. 92.

(15) *Sonawala v. Lahore Electric Supply Co.* [1936] L. 207, 159 I.C. 766.

(16) *Peninsular Life Assurance Co.* [1936] B. 24, 37 Bom. L.R. 904, 160 I.C. 638.

(17) *Hakim Rai v. Peshawar Bank* [1915] 31 I.C. 865; *Nanney v. Morgan* [1885] 37 Ch. D. 346.

(18) *Powell v. London & P. Bank* [1893] 2 Ch. 555; *Ex. p. Sargent* [1874] 17 Eq. 273; *Taylor v. G. I. P. Ry. Co.* [1859] 4 De G. & J. 559; *France v. Clarke* [1885] 26 Ch. D. 257; *Fox v. Martin* [1895] 64 L.J. Ch. 473.

(19) *Murray v. Bush* [1873] L.R. H.L. 37, 50; *McEuen v. West London & C. Co.* [1871] 6 Ch. App. 665; *Musgrave & Hart's case* [1867] 5 Eq. 193; *Marino's case* [1867] 2 Ch. App. 596; *London Founder's Assn. v. Clarke* [1888] 20 Q.B.D. 576; *Ex. p. Hennessey* [1805] 2 Mac. & G. 201.

(20) *Buckley*, 11th ed., p. 683.

(21) *Dodds v. Cosmopolitan Insurance Corpn.* [1915] S.C. 992.

(22) *Hakim Rai v. Peshawar Bank* (supra).



to the transferor of its refusal to register the transfer (23). But now see sub-s. (2) of s. 111.

A company is not however justified in refusing to register a transfer on the assumption that it is a breach of trust (24). The proper course for the company is to give notice that unless proceedings are taken within a specified time, it will proceed to register the transfer (25). A company cannot refuse to register a transfer to a bankrupt director on the ground that the shares will pass to the trustee in bankruptcy (26).

Although the articles prescribe certain conditions which have to be complied with to entitle a transferee to get his name on the register, those are matters which the company may or may not insist upon (27). Where shares are transferred to a firm in the firm name, the company is not bound to register the transfer, as the firm is not a person (28).

**508. Effect of registration on company's lien :—**If the articles give the company a lien on the shares, and the directors allow registration of transfer before the debt is paid, the company loses the security (29). But the directors cannot, by delaying registration, acquire a lien which would defeat the transfer (30). A purchaser of shares subject to a lien is bound by it; but he may require the company to resort first to any shares remaining in the hands of the transferor (31). A purchaser at Court sale is entitled, as of right, to have his name entered on the register of members, but he is subject to the same rules as a private purchaser (32).

**509. Security on shares :—**A security may be given on shares by a legal mortgage in which case a transfer to the mortgagee is executed and registered, or by an equitable mortgage by deposit of the share certificate with or without a transfer in full or in blank executed by the mortgagor. But the equitable mortgagee's position is not always safe as the mortgagor may obtain a fresh certificate and frustrate the claim of the mortgagee (33). The position of an equitable mortgagee of shares is not however prejudiced by the mortgagor's bankruptcy, although the shares remain registered in his name and notice of the mortgage has not been given to the company (34). On the other hand, even an out and out transfer is unavailing if the registration was obtained by misrepresentation (35). When a shareholder executes blank transfers to enable another to deal with the shares, he is bound not to do anything to prevent registration of the transfer, and if he does improperly intervene, he will be liable in damages (36).

A mortgagee of shares must give notice of his incumbrance to the company, or his lien will be lost as against a subsequent purchaser for value without notice (37). Where the mortgagee of shares gave notice of the mortgage to the company before he made the advance to the mortgagor and the company assented to the deposit of

(23) *Gustard's case* [1869] L.R. 8 Eq. 138.

(24) *Grundy v. Briggs* (infra).

(25) *Grundy v. Briggs* [1910] 1 Ch. 444.

(26) *Sutton v. English & Colonial Produce Co.* [1902] 2 Ch. 502.

(27) *Union Indian Sugar Mills Co. v. Jai Deo* [1921] 44 All. 151 (153).

(28) *Vagliano Anthracite Collieries* [1910] W.N. 187, 103 L.T. 211; see also observations of Farwell L. J. in *Sadler v. Whiteman* [1910] 1 K.B. 868 at p. 889; but see *Weikersheim's case* [1873] 8 Ch. App. 831.

(29) *Bank of Africa v. Salisbury Gold Co.* [1892] A.C. 281.

(30) *M'Arthur Ltd. v. Gulf Line Ltd.* [1909] S. C. 732 (Cl. of Sess.).

(31) *Buckley*, 10th ed., p. 42.

(32) *Gray v. Stone* [1893] W.N. 133, 69 L.T. 282.

(33) *Bradford Banking Co. v. Briggs, Sons & Co.* [1886] 12 App. Cas. 29.

(34) *Colonial Bank v. Whinney* [1886] 11 App. Cas. 426.

(35) *Lindlar's case* [1910] 1 Ch. 207, 312 (C.A.).

(36) *Hooper v. Herts* [1906] 1 Ch. 549.

(37) *Cumming v. Prescott* [1837] 2 Y. & C. 488.

the shares to the mortgagee, the latter was entitled to have the deposit of shares registered in the books of the company and to be paid dividends thereon (38). Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum, the lender being ignorant of the limitation, the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery and although the lender made no inquiry (39). Where shares are pledged with a company, the legal owner thereof is the shareholder and not the company. He alone must be held liable for all unpaid calls thereon (40).

"A mortgagee of shares," observed Lord Halisham, L. C. in a recent case, "cannot split up the interest of the mortgagor and sell the mortgagor's beneficial interest while retaining for himself the legal title, any more than a mortgagee of a house can sell the fixtures in the house leaving the mortgagor the equitable owner of what is left" (41).

**Pledge or mortgage** :—There can be a pledge as well as mortgage of shares in India ; whether it is one or the other will depend on the intention of the parties and the circumstances of each case (42). In the last cited case, it was held to be a mortgage.

**510. Forged transfer** :—A forged transfer does not give the alleged transferee a title to the shares and does not estop the company by registration (43). If a company acts upon a forged transfer, it may be compelled to restore the shares to the true owner paying him also any dividends that may have been declared in the mean time (44). Even the sending of a notice to the alleged transferor to the effect that a transfer in his name has been lodged, does not protect the company in the case of a forged transfer (45). The company will however be entitled to damages from the person who procured registration by the forged transfer (46).

As observed by Kanga, J., "except where a shareholder is estopped from denying the title of some particular transferee, the general rule of English law is that a purchaser of shares acquires no better title than his vendor himself has [*Colonial Bank v. Cady*] (47) and that shares in this respect are like other goods and chattels" (48).

**511. Implied contract to indemnify for forgery** :—A contract will however be implied on the part of the person lodging a transfer that he will indemnify the company if the document prove to be forgery, and the broker, who deposits the forged transfer in good faith, is equally liable to the company for any loss it may suffer thereby (49). If the forgery is discovered before the transferee has acquired rights by estoppel, the company may recover the certificate and remove the transferee's name from the register. If the broker represents that he has authority to act for the supposed transferor, he is liable upon an implied contract that he has

(38) *Prietsch v. E. B. Indigo Co.* [1866] 1 Ind. Jur. N. S. 278.

(39) *Brocklesby v. Temperance P. B. Society* [1895] A.C. 173 (183).

(40) *West v. Beni Pershad* [1914] 24 I.C. 236, 165 P.L.R. 1914.

(41) *Hunter v. Hunter* [1936] A.C. 222 at pp. 248-49.

(42) *Arjun Prasad v. Central Bank of India* [1956] Pat. 32, 34 Pat. 8.

(43) *Simm v. Anglo-American Telegraph Co.* [1879] 5 Q.B.D. 188 ; *Davis v. Bank of England* [1824] 2 Bing. 393.

(44) *Barton v. North Staffordshire Ry. Co.* [1888] 38 Ch. D. 458 ; *Barton v. London & N. W. Ry. Co.* [1890] 24 Q.B.D. 77.

(45) *Barton v. London & N. W. Ry. Co.* (supra).

(46) *Sheffield Corpn. v. Barclay* [1905] A.C. 392 ; see also *Starkey v. Bank of England* [1903] A.C. 114.

(47) [1890] 15 App. Cas. 267.

(48) *Fazal v. Mangaldas* [1921] 46 Bom. 489, 502.

(49) *Sheffield Corpn. v. Barclay* (supra).

authority (50). A person who identifies a transferor is liable, if it turns out that a fraud has been committed (51).

**512. Production of share certificate :—**Whether a transfer should or should not be registered without production of the share certificate, is a matter within the discretion of the directors (52). In passing transfers the directors should not act upon undertakings or promises given to the intending purchasers, but should exercise an unfettered discretion (53). If a director refuses to attend a board meeting to pass transfers and so makes it impossible to form a quorum, the Court will order rectification of the register of members by inserting the name of the transferee in the place of the transferor (54).

**513. Which objections are valid :—**The mere fact that transfers of shares are made to increase the voting power of the transferor or in his interest, is no ground of objection to the transfer, for the directors have no power to refuse a transfer of shares, as it is a right of property, except upon personal objection to the transferee (55). It is no valid objection that the transfer is made to avoid a prospective call (56). A colourable transfer however will not discharge the transferor from liability (57). But the transfer of a controlling interest in a company is not a mere matter of internal management, as it may involve a complete transformation of the company and consequently may, in a proper case, be restrained (58).

**514. Certification and estoppel :—**By certification the secretary does not warrant the transferor's title or the validity of the several documents which together establish his title (59). There is no estoppel where the secretary certifies without authority (60). The board of directors is generally the body which has authority to direct registration of transfer. The secretary has no implied authority from the directors of the company to register transfers (61). If a transfer of shares purporting to be fully paid up is certified, the shares being in fact only partly paid up, the company will be estopped from denying that the shares are fully paid up (62). The receipt, after lodgment of certificate, does not bind the company either to recognize the transferee's title to the shares or to issue the corresponding certificate (63).

In permitting the secretary to certify transfers, the company does not authorize him to do more than give a receipt for the certificate of shares. If the secretary gives a receipt or an acknowledgement for certificates which have not been lodged, the company is not estopped from setting up the facts (64), nor is the company estopped from denying the alleged transferee's title on the ground of invalidity of the forged transfer (65), as the certification does not guarantee the title of the person lodging

(50) *Starkey v. Bank of England* [1903] A.C. 114.

(51) *Bank of England v. Cutler* [1907] 1 K.B. 889.

(52) *Shropshire & C. v. Queen* [1877] 7 H.L. 496. See now s. 108

(53) *Clark v. Workman* [1920] I.R. 107.

(54) *Copal Varnish Co.* [1917] 2 Ch. 349; the successive operations by which a transfer is validly made has been pointed out in this case, *vide* p. 354.

(55) *Moffat v. Farquhar* [1877] 7 Ch. D. 591.

(56) *Cawley & Co.* [1889] 42 Ch. D. 209 (C.A.).

(57) *Hyam's case* [1859] 1 De G. F. & J. 75 (C.A.).

(58) *Clark v. Workman* (supra).

(59) *Per Lindley J.* in *Bishop v. Balkis Consolidated Co.* [1890] 25 Q.B.D. 512; *Rivett-Carnac v. New Muffussil Co.* [1902] 26 Bom. 54.

(60) *George Whitechurch Ltd. v. Cavanagh* [1902] A.C. 117; *Bishop v. Balkis Consolidated Co.* (supra).

(61) *Chida Mines v. Anderson* [1905] 22 T.L.R. 27.

(62) *Mackay's case* [1896] 2 Ch. 757; *George Whitechurch Ltd. v. Cavanagh* (supra).

(63) *Longman v. Bath Electric Tramways* [1905] 1 Ch. 646.

(64) *George Whitechurch & Co. v. Cavanagh* (supra). per Lord Macnaghten at p. 125.

(65) *Rivett-Carnac v. Moffussil Bank* (supra).

the certificate (66). If the secretary certifies a transfer when no certificate of the shares have in fact been lodged, his statement in that behalf is not in law the statement of the company (67).

A transfer wrongly certified confers no liability on the company (68). If the secretary instead of cancelling the deposited certificate parts with the same, the company would be liable for any loss occasioned thereby, but would incur no liability to a third person with whom the transferor might improperly pledge the certificate (69). After registration of the transfer the original certificate should be destroyed, otherwise in case of fraud committed by the transferor, the company may be liable to the transferee if he has suffered any damage thereby; but the company is not liable to a third person (69).

For other cases bearing on the question of validity of transfers and their recognition by the company, see notes to s. 155, *post*.

**515. Transfer in blank :—**Where under the articles of a company a transfer of shares may be made by an instrument in writing the transferor may sign a blank transfer and hand it over to a purchaser or mortgagee with authority to the holder of it for the time being to fill in the name of the transferee. Such a transfer when filled up can be sent in for registration and the transfer will be valid as between the parties to the transaction and where the right of no third parties is involved (69).

Whether it be a matter of agency or authority or contract, the transferee in cases of transfers of shares in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer after the death of the original transferor. The instrument then is complete and the transferee is entitled to have his name registered in the company's register (70). Where a transfer in blank has been used for effecting a transfer, the transferor cannot take a technical objection as to the filling in of the consideration to defeat the object for which he gave the transfer (71). But where a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill up for purposes foreign to the original contract (72). If the owner of the certificate leaves it and an executed transfer with his broker who wrongfully pledges it with a bank, the title of the bank which had no notice of the fraud will prevail (73). But where the plaintiff wishing to sell certain shares was induced by his broker to execute a transfer in blank and the broker afterwards filled in the number &c. of the shares of another company of which the plaintiff was the owner, and the broker also stole the share certificates from the plaintiff's box and passed the transfer as a genuine transfer, and the name of the purchaser was registered, it was held that the plaintiff was not guilty of culpable negligence such as estopped him from asserting that the transfer deed was a forgery and from claiming damages and a mandamus to have his name restored to the register (74). A transfer in blank executed by an executor, who had not registered himself as owner of the shares, will

(66) *Ibid* p. 74.

(67) *Klienwort, Sons & Co. v. Associated Automatic Machine Corpn.* [1934] 50 T.L.R. 244 (H.L.).

(68) *Manilal v. Gordhan Spinning & Co.* [1917] 41 Bom. 76; *Nagabhusanam v. Ramchandra* [1922] 45 Mad. 537.

(69) *Arjun Prasad v. Central Bank of India* [1956] Pat. 32, 34 Pat 8.

(70) *Bengal Silk Mills Co.* [1942] C. 461, 45 C.W.N. 1109, [1942] 1 Cal. 122, 201 I.C. 778, relying on *Carter v. White* [1884] 25 Ch. D. 666.

(71) *Indo-China Steam Navigation Co.* [1917] 2 Ch. 100.

(72) *France v. Clarke* [1884] 26 Ch. D. 257.

(73) *Fuller v. Glyn, Mills, Curry & Co.* [1914] 2 K.B. 168; *Fazal v. Mangaldas* [1921] 46 Bom. 489.

(74) *Swan v. North British Australian Co.* [1863] 32 L.J. (Ex.) 273.

not estop the owner (75). "Whatever may be the effect of an instrument so executed, one thing is clear that it cannot be regarded as either in law or by custom equivalent to a certificate and transfer executed by the registered owner himself" (75). In the last cited case Lord Watson observed: "Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would therefore be more accurate to say that such delivery passes not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner" (76). Where a person obtains possession by fraud of a share certificate and a transfer in blank executed by the owner, he cannot however pass a good title to a *bona fide* purchaser for value (77). But if a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered passes to the buyer, and if he sells and delivers the goods to a *bona fide* purchaser for value without notice, it passes to such a purchaser (78).

In the case of a share certificate with a blank transfer duly signed by the registered holder, the right principle is that each prior holder confers on the *bona fide* holders for value of the certificate for the time being an authority to fill in the name of the transferee and is estopped from denying such authority, and to this extent, but no further, is estopped from denying the title of such holder for the time being (79). By delivery an inchoate legal title passes: but a title by unregistered transfer is not equivalent to the legal estate in the shares or to the complete dominion over them. The certificate with blank transfers "contemplates transfer by getting in the name of the transferee and by registration on the books of the company" (80).

Where the transfer in blank was not executed by the transferee, nor the board of directors' consent was obtained (as required by the articles) to the transfer, nor the shares were transferred to the name of the transferee in the register, it was held that the transferor's name could not be removed from the list of contributories (81).

**516. Stamp :—**Where a transfer has been passed by mistake and the transferee's name has been entered in the register of members, it may be corrected by the company and the register amended (82). The register however should not be altered on the basis of a transfer not duly stamped, and the directors are entitled to go behind what appeared on the face of the document (83). A company is not bound by the consideration stated in the transfer. Registration may properly be refused if the stamp is not adequate to the real consideration (83). But if a transfer is apparently stamped properly and the transferee's name is registered, an objection taken subsequently will not affect the transferor's title (84). As to who shall pay the stamp duty, see s. 29 [No. 62 (a)] of the Stamp Act (II of 1899). For stamp duty on transfer see Appendix—"Stamp duty".

(75) *Colonial Bank v. Cady* [1890] 15 App. Cas. 267, 279.

(76) *Ibid.*, at pp. 277-78.

(77) *Hazari Mull v. Satish* [1918] 46 Cal. 331; see s. 108 of the Contract Act.

(78) *Fazal v. Mangaldas* [1921] 46 Bom. 489.

(79) *Colonial Bank v. Hepworth* [1887] 36 Ch. D. 36.

(80) *Ibid.* at p. 53 per Chitty J. See also *Sheffield & C. Ry. Co. v. Woodcock* [1841] 7 M. & W. 574.

(81) *East India Banking Co.* [1867] 3 Bom. H.C.R. (O.C.) 113.

(82) *Anderson's case* [1869] 8 Eq. 509.

(83) *Maynard v. Consolidated K. C. Corpn.* [1903] 2 K.B. 121.

(84) *Indo-China Steam Navigation Co.* (*supra*).

**517. Priority of title:—**As between two persons claiming title to shares registered in the name of a third person, priority of title prevails unless the claimant second in point of time, can show that as between himself and the company, before the company received notice of the claim of the first claimant, the second claimant has acquired the full status of a shareholder, or at any rate that all the formalities have been complied with, and that nothing more than some ministerial acts remains to be done which the company cannot refuse to do forthwith (85).

If none of the transfers are registered, the first in point of time has priority (86), and this priority is not lost because some ministerial act has not been done (87). The onus is on the transferee, later in point of time, to show that he acquired the full status of shareholder earlier (88).

**518. Deed is not necessary:—**A transfer of shares need not be made by deed unless the articles so require it (89). (A deed means one signed, sealed and delivered) (90). In such a case, in the absence of conduct estopping the party from disputing that he is a shareholder in respect of the shares transferred, the transfer is not valid without a deed (91). There is no estoppel where the documents are *prima facie* complete (92).

**519. Surrender of share:—**It is not open to a shareholder to surrender his shares, or to the company to accept the surrender, unless the act of the company can be brought within the rules relating to forfeiture of shares (93). A surrender of shares, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company and is therefore illegal and void (94).

A transaction which results in reduction of capital whether called for or otherwise is invalid without the sanction of the Court under ss. 100 and 101. The only statutory exception is forfeiture under conditions laid down by law. Surrender where authorised by the articles is only permissible where it is equivalent to forfeiture, or is made and accepted as a short cut to forfeiture (95).

**520. Share certificate:—**In India share certificates are movable property within s. 108 of the Indian Contract Act (96). Shares are "goods" also within the meaning of s. 76 of the same Act, and where the denoting numbers of the shares are not ascertained at the time of the contract, but share certificates are handed with transfer executed by the transferor (even in blank) and accepted by the purchaser.

(85) *Sethana v. National Bank of India* [1912] 36 Bom. 334; *Moore v. North-Western Bank* [1891] 2 Ch. 599; see also *Peat v. Clayton* [1912] 1 Ch. 659.

(86) *Peat v. Clayton* (supra).

(87) *Moore v. North-Western Bank* (supra); *Ireland v. Hart* [1902] 1 Ch. 522.

(88) *Bunn's case* [1860] 2 De G. F. & J. 275; *Elkington's case* [1867] 16 L.T. 301, 2 Ch. App. 511.

(89) *London Founder's Assn. v. Clarke* [1888] 20 Q.B.D. 576.

(90) In England the Companies Clauses Act, 1845 required a transfer of shares to be by deed, but since 1862 the language used in Table A has been "instrument in writing."

(91) *Maynard v. Consolidated K. C. Corpn.* [1903] 2 K.B. 121.

(92) *Balkis Consolidated Co.* [1888] 58 L.T. 300.

(93) *In re Mirza Ahmad* [1924] M.W.N. 582, 83 I.C. 94; *Bellerby v. Rowland & Co.* [1902] 2 Ch. 14; *Denver Hotel Co.* [1893] 1 Ch. 495; *Collector of Moradabad v. Equity Insurance Co. v.* [1948] O. 197, 23 Luck. 210, (1948) O.W.N. 172.

(94) *Bellerby v. Rowland & Co.* [1902] 2 Ch. 14, at p. 25; *Thevor v. Whitworth* [1887] 12 App. Cas. 409; *Vazirmal v. Makran Coast Steam Navigation Co.* [1838] Sind. 187.

(95) *Official Liquidator v. Suleiman* [1955] M.B. 166.

(96) *Fazal v. Mangaldas* [1921] 46 Bom. 489; *Hazari Mull v. Satish* [1918] 46 Cal. 331.

the shares become ascertained goods and the sale is complete (97). "Title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder" (97). Provisions in the articles authorizing the holders of scrips to pass shares by delivery are irregular and such a company may be ordered to be wound up (98). If a shareholder disposes of his shares by invalid transfer, he remains liable in respect of those shares (99).

**521. Position of purchaser at Court sale:** In *Manilal v. Gordhan Spinning Co.* (1) and *Nagabhusanam v. Ramchandra* (2) it was held that a purchaser of shares at a Court sale was in the same position as a transferee from a shareholder and therefore his right to have his name registered was subject to the discretion given to the directors to refuse registration of a transfer. But this has been doubted in a later decision (3) of the Madras High Court. Srinivasa Ayyangar and Anantha Krishna Ayyar, JJ. have in this case held that in the absence of anything in the articles forbidding the same, a sale by the Court of shares held by a member has the effect of transferring the shares to the purchaser and that the expression "transfer" is not by itself altogether appropriate to indicate a sale by the Court, and therefore any provision regarding voluntary transfer in the articles will not apply to transfer by a Court sale. They have further held that O. XXI, r. 80, C. P. C. is only permissive and it is not necessary, when a share of a company is sold in Court auction, that the Court should execute a transfer before the purchaser can be entitled to such share. Their Lordships are of opinion that this rule is applicable to cases where, for instance, specific performance of an agreement to sell shares has been decreed. But with great respect to the learned Judges it is submitted that the view taken by them of the articles in that case and of Rules 79 and 80 of Order XXI, C. P. C. do not appear to be correct. It is apprehended that to the case of a purchase at a Court sale of shares belonging to a deceased member, the articles relating to transfer of shares are more appropriate than those relating to transmission of shares. It may also be pointed out that Rule 80 forms part of a group of Rules which come under the heading "Sale of movable property;" so the words "where the execution of a document . . . is required to transfer such . . . share" probably mean that where such execution is required by the articles of association of the company.

In a very recent case the Nagpur High Court has held that the case of purchaser of share at a Court auction does not fall under reg. 22 of Table A of the previous Act, and, therefore, the contention that a transfer in a Court sale is a transmission of the shares to the purchaser and the discretion which vests in the directors to refuse to register a transfer cannot be exercised in the case of a transmission, cannot be accepted as correct (4). Such a purchaser does not automatically become a member, in view of the provisions of Or. 21, rr. 79 and 80, C. P. Code. He can only become a member on compliance with the requirements of regs. 18 and 19 of the old Table A. A transfer of the share has, therefore, to be completed by the judgment debtor as required by the regs. 18 and 19. Under sub-s. (3), of s. 34 of the previous Act it is not lawful for the company to register a transfer of share, without a proper instrument of transfer delivered to the company with the script. If the

(97) *Maneckji v. Wadilal Sarabhai & Co.* [1926] 53 L.A. 92, 50 Bom. 360, 30 C.W.N. 890.

(98) *Princess of Reuss v. Bos.* [1871] L.R. 5 H.L. 176. As to scrips, see notes to s. 84 *post*.

(99) Buckley, 10th ed. p. 42.

(1) *Manilal v. Gordhan Spinning & Co.* [1917] 41 Bom. 76.

(2) *Nagabhusanam v. Ramchandra* [1922] 45 Mad. 537.

(3) *Mohideen v. Tinnevely Mills Co.* [1928] M. 571, 21 M.L.W. 982, 111 I.C. 225 followed in *Mahadeo v. Darjeeling Union Tea Co.* [1951] 55 C.W.N. 408.

(4) *Balwant Transport Co. v. Despande* [1956] N. 20.

judgment debtor refuse to execute the transfer as required by regs. 18 and 19 (of the old Table A), then the Court steps in under Or. 21, r. 80 C. P. C. to effectuate the transfer in favour of the purchaser (4). In either case, on a transfer being presented for registration to the company, the provisions of reg. 20 (of old Table A) are necessarily attracted and the directors still have a discretion to refuse to register the transfer (4).

At a Court sale the purchaser does not purchase, over and above the share, the absolute right of forcing the directors to register his name. That is a right which *ex hypothesi* "the court never had to sell." Nor does an auction sale enlarge the rights of a shareholder. The share purchased is subject to the same incidents and restrictions as regards transfer as before the sale (5). See in this connection sub-s (8) of s. 111 of the present Act.

**522. Situs of share:**—The true test of *situs* of a share for the purpose of jurisdiction is—"Where could the shares be effectively dealt with" (6), that is, where there is a branch office for registration of transfer of shares and not necessarily the head office (6). Following the last cited cases the Judicial Committee have held that the test which must be applied to determine the local situation of shares is where the shares can be effectively dealt with: where a transfer of the shares must be effected by a change in the register of members, the place where the register is to be kept under the law determines the locality of the shares (7).

**523. Forfeiture of shares generally:**—The question whether the fully paid up shares of a company can be forfeited by the company, *i.e.*, whether a company is entitled to forfeit the shares of a member in accordance with its articles of association otherwise than for non-payment of calls on the shares came up before Mr. Justice Das of the Calcutta High Court in a recent case (8). The Calcutta Stock Exchange Association, Ltd., in pursuance of its articles of association, forfeited the share of a member upon his failure to fulfil his engagement with other members. A creditor who had already attached the share took out an injunction restraining the association from parting with the sale proceeds of the share. It was held that the injunction should be dissolved (8). In the last cited case Mr. Justice Das has held that the Act sanctions forfeiture of shares generally and not for non-payment of calls only, and Table A of the Act does not control the forfeiture recognized in the body of the Act in s. 32 (2) (g) of the old Act and in Form E of Sch. III thereof. He has also held that the shares of a company are held subject to its articles of association and any liability to forfeiture under the articles is an inherent defect in the rights of a member and that a creditor can have no higher right. His Lordship has further held that the exercise of the power of forfeiture does not bring about any illegal reduction of capital in contravention of s. 55 of the old Act (now s. 100) especially in view of the fact that the shares are fully paid up; nor does such forfeiture amount to a buying by the company of its own share in contravention of s. 54A (now s. 77).

In the aforesaid case Mr. Justice Das said: "In Stiebel's Company Law, 3rd ed., p. 206, in Halsbury's Law of England (Hailsham, ed., Vol. V), Arts. 492-93, in Gore-Brown's Joint Stock Companies, 34th ed., p. 408 and in the students' portion of Topham's Principles of Company Law to which I have been referred by Mr. Mitra, there are passages suggesting that forfeiture otherwise than for non-payment of calls

(5) *Ibid*, relying on *Manilal v. Gordhan Spinning & Manfg. Co.* [1916] B. 147, 41 Bom. 76.

(6) *Brassard v. Smith* [1925] A.C. 371 at p. 376; *A. G. v. Higgins* [1857] 2 H. & N. 33.

(7) *Erie Beach Co. v. A. G. of Ontario* [1930] A.C. 161 (P.C.), [1930] P.C. 10; *Ahmed v. Collector of Surat* [1936] B. 447, 41 Bom. L.R. 934.

(8) *Naresh Chandra v. Ramani Kanta* [1945] 49 C.W.N. 503.



is invalid" (9). He has also referred to *Hopkins v. Mortimer, Harley & Co.* (10)—a decision to the same effect, but his Lordship has differed from the view taken by Mr. Justice Eve in the case. Now with very great respect to the learned Judge it is submitted that the view taken by Mr. Justice Eve and the learned authors in England seems to be correct and there appears to be no direct authority in the long course of decisions on company law in England supporting the view of Mr. Justice Das. The reference to forfeited shares in s. 32 (2) (g) and From E. of Sch. III of the old Act is, it is apprehended, no direct authority for the proposition that the Act sanctions forfeiture of shares generally. Even in respect of provisions in the articles of association of a company authorizing forfeiture of shares for non-payment of calls, it is settled law that such articles should be strictly construed (11). The above decision of Mr. Justice Das has gone further, for it says: "These articles afford means to the association to get rid of a defaulting member . . . the defaults leading to suspension, expulsion and forfeiture contemplated by these clauses over a variety of misconduct which renders the members guilty of such misconduct an undesirable member" (12).

After the above view was expressed by the author of this book, the question again came up for consideration before Sinha J. in *S. N. Kundu & Co. v. Calcutta Stock Exchange Assn.* (13), in which the learned Judge held as follows: All forms of forfeiture involves reduction of capital, only one form, *i.e.*, that of forfeiture for non-payment of calls was valid as it was authorised by the Companies Act. All other forms of forfeiture are illegal and void. In this case the article permitting forfeiture and re-sale in fact permitted trafficking in shares and therefore was *ultra vires* and could not be enforced (13). On appeal (14) from this decision before Harris C.J. and Chakravarti J., Harris, C.J. observed as follows: "Sinha J. was convinced that the earlier decision of Das, J. [in *Narish v. Ramani* (1945) 49 C.W.N. 503] was erroneous and therefore I am unable to say that he was wrong in differing from him" (at p. 242). "The present form of forfeiture is not usual and would be wholly unnecessary in a trading company, though absolutely essential in an association like the Stock Exchange Association" (at p. 264). "Though I accept the view of Das, J. that the Indian Companies Act recognizes forfeiture generally, that articles 24 to 30 of Table A are merely specimen articles to one form of forfeiture, nevertheless it must be held that reference to forfeiture would not necessarily make all forms of forfeiture legal and valid", (at page 264). "If however the form of forfeiture provided by the articles of association does not offend against either the provisions of the Companies Act or the law of the land, I see nothing in the Companies Act which makes such a forfeiture invalid or unlawful (at p. 261). "It may well be that the possibility of forfeiture for other reasons was not in mind of the draftsman (in drafting sub-s (4) of s. 104 of the previous Act)" (at page 265).

In the same case (14) P. B. Chakravarti J. observed as follows: "The question is by no means free from difficulty and the difficulty has been increased by the condition of authorities to which more than one English Judge had occasion to refer" (at page 266). "The framer of the Act, I apprehend, never had in mind the case of a company exercising the power of forfeiture against its members as a penalty for misconduct or as a means of enforcing payment of debts which one member owed to another, such as contemplated by the Articles of Association in the present case" (at page 267).

(9) Ibid at p. 508.

(10) [1917] 1 Ch. 646.

(11) See notes to Reg. 29 *et seq.* of Table A *post*.

(12) *Narish Chandra v. Ramani Kanta*, *supra* at p. 509.

(13) *Vide Calcutta Stock Exchange Assn. v. S. N. Nundy & Co.* [1950] 1 Cal. 235.

(14) *Calcutta Stock Exchange Assn. v. S. N. Nundy & Co.*, *supra*.

For the definition and meaning of "share" see s. 2 (46) and notes thereto.

For other cases see notes to s. 155 and regulations 19, 21 and 22 of Table A.

**523A.** :—Shares of companies registered under Act XIX of 1857 and Act VII of 1860 were transferable in the manner then in use or in such other manner as the company might direct.

### **83. Numbering of shares.**—Each share in a company having a share capital shall be distinguished by its appropriate number.

This section corresponds to s. 28 (2) of the previous Act and s. 74 of the English Act of 1948.—*Notes on Clauses.*

This was originally cl. 77 of the Bill. The Proviso therein has been deleted by the Joint Committee with the following remark :—"The proviso to the original clause would have enabled companies under certain circumstances to issue shares without numbers. The Committee consider that there is no necessity for this proviso and it has accordingly been deleted in the new clause" (*vide* J. C. R., para 99).

### **84. Certificate of shares.**—A certificate, under the common seal of the company, specifying any shares held by any member, shall be *prima facie* evidence of the title of the member to such shares.

This section corresponds to s. 29 of the previous Act and s. 81 of the English Act of 1948. As "share" has been defined in s. 2 of the Act as including stock, it is unnecessary to refer to stock in this section.—*Notes on Clauses.*

For definition of "share" see s. 2 (46).

**524. Meaning of stock** :—"Stock" is the aggregate of fully paid up shares legally consolidated and portions of which aggregate may be transferred or split up into fractions of any amount without regard to the original nominal amount of shares (15). Where shares have been fully paid up, they may be turned into stock and notice of this must be given to the Registrar (16). The issue of a partly paid up stock is void (17). A forged transfer of stock does not affect the title of the stock-holder (18).

**525. Certificate of shares** :—The certificate of shares is the documentary evidence in the possession of the shareholder (19). It is not a negotiable instrument or warranty of title by the company (20). But if a *bona fide* purchaser for value acquire the shares relying on a certificate, the company will be estopped from denying the validity of the certificate (21), even if the transfer be a forged one (52). The measure of damages is the value of the shares at the time the company first refused

(15) *Morrice v. Aylmer* [1875] L.R. 7 H.L. 717.

(16) Section 95.

(17) *Home & Foreign Investment Co.* [1912] 1 Ch. 72.

(18) *Davies v. Bank of England* [1824] 2 Bing. 393.

(19) *Societe general de Paris v. Walker* [1885] 11 App. Cas. 20; *Burkinshaw v. Nicolls* [1878] 3 App. Cas. 1004, 1027; followed in *A. W. Hall & Co.* [1887] 37 Ch. 712.

(20) *Longman v. Bath Electric Tramways* [1905] 1 Ch. 646 (C.A.); *Hazari Mull v. Satish* [1918] 46 Cal. 331.

(21) *Bahia & C. Ry. Co.* [1868] L.R. 3 Q.B. 584, 595; *Ottos Kopje Diamond Mines* [1893] 1 Ch. 618; *Ruben v. Great Fingall Consolidated Co.* (*infra*).

to recognize him a shareholder (22). But the payment of dividend does not estop the company from denying the payee's title to the shares (23). If the company authorize the issue of a certificate to a person, it is however estopped from denying his title (24), and if the company is unable to give him the shares, it will be liable in damages (25). On the other hand, if an officer of the company issues certificates without authority, there will be no estoppel (26). The company may however be liable in damages for the fraud of its officers committed within the scope of their authority (27).

The certificate is a statement as against the company that the person, whose name appears on it, is the registered holder of the shares (28), and in the case of a *bona fide* purchaser for value without notice, that the amount certified as paid has been paid (29). The company is not however estopped from denying the purchaser's title by the mere fact that it has treated him as a shareholder by sending him a dividend warrant (30). Where the certificate contained a statement that the shares were fully paid up, the onus lay on the liquidator to show that the party sought to be made liable had notice that they were not so (31). The company will not be liable on share certificates to which the secretary has forged the directors' names (32).

A foot-note under the share certificate to the effect that before a transfer is registered the certificate must be produced is only a warning. As it is not addressed to outsiders it does not create a contract or estoppel (33). A director, by being merely present at a meeting at which a certificate is passed, is estopped from denying its accuracy (34).

**526. Scrip certificates :—**Share certificates are often incorrectly mentioned as scrips. 'In scrip companies where scrip certificates have been issued entitling the holders, on certain conditions complied with, e.g., payment of instalments and registration, to shares, there will, if such conditions are conditions precedent, be no completed contract until the conditions are complied with. The contract will be merely contract entitling the scrip-holder at some future time to apply for or receive an allotment of share. And at any rate, an allottee of scrip in such a case who sells his scrip before registration, or whose scrip is forfeited for non-payment of instalments, is not liable for shares. But if an applicant has become and been registered as a shareholder, and then the company having no power to issue anything but shares transferable by deed issues to him scrip certificates transferable by delivery, and he delivers them to a purchaser, this does not discharge him from liability as a shareholder. For the transaction amounts at most to an equitable contract that the company will accept

(22) *Bahia &c. Ry. Co.* [1868] L.R. 3 Q.B. 584, 595; *Ottos Kopje Diamond Mines* [1893] 1 Ch. 618; *Ruben v. Great Fingal Consolidated Co.* (infra).

(23) *Foster v. Tyne Pontoon &c. Co.* [1894] 63 L.J. (Q.B.) 50.

(24) *Divon v. Kennaway & Co.* [1900] 1 Ch. 833.

(25) *Tomkinson v. Balkis Consolidated Co.* [1891] 2 Q.B. 614; on appeal [1893] A.C. 396.

(26) *Ruben v. Great Fingal Consolidated* [1904] 2 K.B. 712, affirmed in the House of Lords [1906] A.C. 439.

(27) *Lloyd v. Grace Smith & Co.* [1912] A.C. 716.

(28) *Bahia &c. Ry. Co.* (supra); *Tomkinson v. Balkis Consolidated Co.* (supra).

(29) *Burkinshaw v. Nicolls* (supra); *Bush's case* [1874] 9 Ch. App. 554; *Bloomenthal v. Ford* [1897] A.C. 156; *Markham & Darter's case* [1899] 1 Ch. 414; *British Farmer's P. L. Coke Co.* [1878] 7 Ch. D. 533.

(30) *Foster v. Tyne Pontoon &c. Co.* [1894] 63 L.J. (Q.B.) 50.

(31) *A. W. Hall & Co.* (supra); *Burkinshaw v. Nicolls* (supra); see also *Bloomenthal v. Ford* (supra) & *Balkis &c. Co. v. Tomkinson* [1893] A.C. 396.

(32) *Ruben v. Great Fingal &c. Consolidated* [1906] A.C. 439.

(33) *Rainford v. James Keith, Blackman & Co.* [1905] 1 Ch. 296; reversed on facts [1905] 2 Ch. 147; *Guy v. Waterlow* [1909] 25 T.L.R. 515.

(34) *Dixon v. Kennaway & Co.* (supra).

the holder of the scrip certificates as a shareholder on the allottee doing all acts necessary to clothe him with that contract ; but this cannot shift the legal liability (35).

Scrip certificates, by which it was certified that after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff and by him deposited with a stock-broker for the purpose of paying the instalments remaining due and dealing with such certificates as the plaintiff should direct. The broker in fraud of the plaintiff and without his authority deposited the scrip with the defendants who were not aware of the fraud. It was proved that the usage among the bankers, discounters, money dealers and on the stock exchange had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery: *Held* on the authority of *Goodwin v. Roberts* (36) that the defendants were entitled to the scrip certificates as against the plaintiff (37). The scrip of a foreign Government issued by it in negotiating a loan (which scrip promises to give to the bearer after all instalments have been duly paid, bond for the amount paid, with interest) is by the custom of all stock markets of Europe a negotiable instrument, and passes by mere delivery to a *bona fide* holder for value. English law follows this custom—and any person taking it on good faith obtains a title to it independent of the title of the person from whom he took it (36). When the instalments mentioned in the scrip have been actually paid, the scrip is as much a symbol of money due, and as capable of passing current by delivery, as the bond itself would be (38).

Where debentures or debenture stock are allotted upon the terms that the same shall be paid for by instalments, it is usual to issue provisional bearer scrip certificates to the subscribers, to be exchanged for definitive debentures or for stock certificates when all the instalments are paid and to endorse upon the scrip certificate the payments of the several instalments. The bearer of the certificate, when the instalments are paid, is entitled to have the debentures or stock certificate to be issued to him (39).

**527. Seal—proof of :—**The mere affixing of the seal is sufficient without witness, unless the articles of association provide otherwise. Where there is a common seal put to a deed, that is title enough of itself without witness to prove it, and if it be said that it was put to by the hand of a stranger, that shall be proved on the side that says so (40). Proof of the seal may be given by any one who knows it, and it is not necessary to call a person who saw it affixed (41). When a deed is found to be sealed, the presumption is that the seal was regularly affixed, and the onus is on the person who alleges the contrary (42). "It is not necessary," as was observed by Lawrence J., "to prove the seal of a corporation in the same manner as the seal of an individual, by producing the witness who saw the seal affixed ; but when an instrument having a seal affixed to it purporting to be a corporate seal, is produced in evidence, it is necessary to prove that it is the seal of the corporation, if there be any doubt about it ; otherwise any instrument with a seal to it might be produced in Court as an instrument sealed by the corporation" (43).

(35) Buckley, 11th ed. pp. 49-50. The framers of the Indian Companies (Amendment) Act XXII of 1936 had erroneously, it is submitted, used the word "scrip" for share certificate in s. 34, sub-s. (3) of the old Act. For form of a scrip certificate see Palmer's Company Proceedings, 15th ed. [1938], p. 1044.

(36) *Goodwin v. Roberts* [1876] 1 App. Cas. 476.

(37) *Rumball v. Metropolitan Bank* [1877] 2 Q.B.D. 194.

(38) *Ibid*, per Lord Selborne.

(39) Halsbury (Hailsham ed.) p. 489.

(40) *Brounkar v. Atkyns* [1681] Skinner 2.

(41) *Moiss v. Thornton* [1799] 8 T.R. 307.

(42) *Clarke v. Imperial Gas Co.* [1832] 4 B. & Ad. 315.

(43) *Moises v. Thornton* (supra).

**528.** A person having power to manage the affairs of a trading company has implied power to affix the seal (44). Negligence of a company in leaving the seal in the custody of a dishonest person will not preclude it from pleading that the seal was wrongfully affixed, and a forgery gives no title (45). Where a secretary to aid his own fraud wrongfully affixed the seal to share certificates apparently in the ordinary course of business, the company came under no liability to honest holders of the certificates (46). Where the certificate is not sealed by the company's authority, it amounts to a forgery and is not binding upon the company (47). See Reg. 84 of Table A and notes thereto.

**529. Statements in share certificate** :—If it is stated in the certificate that the shares are fully paid, the company or its liquidator is estopped from alleging that they are not fully paid up (48). But a person, who knew that the shares were not fully paid, cannot take advantage of the statement in the certificate (49). The fact that the shareholder's partner is a director of the company does not however amount to a constructive notice that the shares are not fully paid (50). Even a director may be protected by a certificate stating them to be fully paid and signed by himself, if he acted in good faith (50). Where the share certificate stated that the shares were fully paid up, the *onus* lay upon the official liquidator to show that the trustee who was the transferee of the shares knew that the shares were not fully paid up (51).

**530. Delivery** :—Delivery of the share certificate may be conditional and may take effect only upon some event happening, e.g., upon the consideration being paid. In that case until the condition is fulfilled the document is an escrow or scrip and has no effect as a deed (52). As to escrow generally see *Foundling Hospital v. Crane* (53).

Where a debtor assigned all his properties to trustees for creditors, but retained the share certificates and subsequently sold the shares to a purchaser for value, the title of the trustees who had given notice to the company prevailed (54).

The certificates of all shares must be ready for delivery within three months after allotment of the share or registration of transfer, unless the conditions of issue provide otherwise (55). A shareholder is entitled to get his certificate within a reasonable time (56).

See s. 113 and notes thereto.

**531. Duplicate certificate** :—Where a company, having no notice of bankruptcy of a shareholder, issued a duplicate certificate to his executor on the representation that the original certificate was lost, while it really was in the possession of the bankrupt's assignee, and then the executor transferred the shares and the transfer was registered by the company, it was held that the purchaser's title was legal and prevailed against the assignee (57). A good equitable charge may be created by the deposit of a share certificate (58).

(44) *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 83.

(45) *Merchants of the Staple v. Bank of England* [1888] 21 Q.B.D. 160.

(46) *Ruben v. Great Fingall Consolidated* (supra).

(47) *South London G. Racecourses, Ltd.* [1931] 1 Ch. 496, 141 L.T. 607.

(48) *Bloomenthal v. Ford* [1897] A.C. 156; *Parbury's case* [1896] 1 Ch. 100.

(49) *African Gold Concessions & Co.* [1899] 1 Ch. 414.

(50) *Coasters Ltd.* [1911] 1 Ch. 86.

(51) *A. W. Hall & Co.* [1887] 58 L.T. 156.

(52) *Spitzel v. Chinese Corporation* [1899] 80 L.T. 347, 15 T.L.R. 281.

(53) [1911] 2 K.B. 367.

(54) *Peat v. Clayton* [1906] 1 Ch. 659.

(55) S. 113.

(56) *Burdett v. Standard Exploration Co* [1900] 16 T.L.R. 112.

(57) *London & P. Telegraph Co.* [1870] 9 Eq. 653.

(58) *George Whitechurch Ltd. v. Cavanagh* [1902] A.C. 117, 126.

*Kinds of share capital*

**85. Two kinds of share capital.**—(1) “preference share capital” means, with reference to any company limited by shares, whether formed before or after the commencement of this Act, that part of the share capital of the company which fulfils both the following requirements, namely :—

(a) that as respects dividends, it carries or will carry a preferential right to be paid a fixed amount or an amount calculated at a fixed rate, which may be either free of or subject to income-tax ; and

(b) that as respects capital, it carries or will carry, on a winding up or repayment of capital, a preferential right to be repaid the amount of the capital paid up or deemed to have been paid up, whether or not there is a preferential right to the payment of either or both of the following amounts, namely :—

(i) any money remaining unpaid, in respect of the amounts specified in clause (a), up to the date of the winding up or repayment of capital ; and

(ii) any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company.

*Explanation.*—Capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely :—

(i) that, as respects dividends, in addition to the preferential right to the amount specified in clause (a), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid ;

(ii) that, as respects capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in clause (b), it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.

(2) “equity share capital” means, with reference to any such company, all share capital which is not preference share capital.

(3) The expressions “preference share” and “equity share” shall be construed accordingly.

"Sections 79 to 83 (now ss. 85 to 90) are based on the recommendations of the Company Law Committee in paras 47-49 of the Report. See also summary of the recommendations at paras 241-244 of the Report"—*Notes on Clauses*.

The C. L. C. observe: "We consider that the above recommendations will adequately safeguard the interests of both preference and ordinary shareholders, so far as voting rights are concerned. At the same time, flexibility is ensured by the authority proposed to be conferred on the Central Authority. This will meet the requirements of those special cases where it is obviously in the interest of the company as a whole that the general rules laid down above should be relaxed, but shareholders will be able to rest assured that directors will not be able to issue shares with disproportionate voting or other rights, unless the issue has been considered and approved by an independent body on the merits of the case—*C. L. C. R. para 49*.

Cls. 84 to 88 (now ss. 85 to 89) will not (a) in the case of any shares issued before the commencement of this Act, affect any voting rights attached to the shares save as otherwise provided in s. 89, or any right attached to the shares as to dividend, capital or otherwise, or (b) apply to a *private company* unless it is a subsidiary of a public company (s. 90).

With respect to these sections the Joint Committee observe:—"The Committee are of the view that 'preference shares' should be more precisely defined and that the tests should be (i) whether there is security of income; and (ii) whether there is a preferential right to the repayment of the capital on a winding up. Clause (84) (now s. 85) has been recast accordingly.

"It has also been made clear in the clause that the dividend on preference shares may be either free of or subject to income tax. The facts (a) that a preference share is entitled in addition to the preferential right to the fixed dividend, to a portion of the dividend depending upon the quantum of the profits, or (b) that on a winding up it carries in addition to the preferential right to repayment of capital, a right to participate in the surplus assets after the entire capital has been paid in full will not have the effect of making the definition of 'preference capital' inapplicable to the case" (*vide J.C.R. para 40*).

In this section in sub-s. (1) (b) (i) after the words "winding up", the words "or repayment of capital; and" have been added by the Lok Sabha.

**531A. Classes of shares:**—Shares may be preferential as to capital, as to dividend or as to both, or may have peculiar privileges in the matter of voting or in other respects. These are generally called "preference" shares as distinguished from "ordinary" shares or "deferred" shares. There may be shares of more classes than three, each of which has peculiar rights and conditions attached to it such as "preference" and "second preference" shares.

As to what are "founders' shares" see notes to s. 56.

**531B. Right of alteration:**—Where the memorandum of association provides for the division of the capital into different classes with different rights, they cannot be altered except as part of a reorganization or arrangement under s. 391. But it is otherwise if the memorandum itself reserves the right to alteration (59). An article like this is valid, when the memorandum is silent on the point (60).

**531C. Shares—power to issue:**—A company having no authority under its memorandum or articles of association to create any preference between different classes of shares, may by special resolution alter the articles so as to authorize the

(59) *Underwood v. London Music Halls* [1901] 2 Ch. 309; *Welsbach I. Gas Co.* [1904]

1 Ch. 87; *James Colmar Ltd.* [1897] 1 Ch. 524.

(60) *South Durham Brewery Co.* [1886] 31 Ch. D. 261; *Harrison v. Mexican Ry.* [1875] 19 Eq. 358; *Bangor Slate Co.* [1875] 20 Eq. 59.

directors to issue preference shares by way of increase of capital (61). If the memorandum or the articles are silent, there is no implied condition that all the shares shall rank equally (62). Where the memorandum of association provides that the preference shareholders are entitled to a cumulative dividend before any dividend is paid or capital repaid to the holders of the ordinary shares, the provision does not prevent the preference shareholders from asserting their statutory right to participate with the ordinary shareholders in any surplus assets (63).

The directors are not justified in acting on an old resolution authorising the issue of shares after the particular purpose for which the authority was given has ceased to be available, nor in issuing shares for the express purpose of creating votes to influence a coming general meeting (64). An injunction will be issued to restrain such issue of shares, it not being the question of internal management (64). Where the articles contained no power to issue preference shares and the company in general meeting passed a resolution for the issue of some of the shares with a preferential dividend, the Court upon motion by three shareholders, who had notice of but did not attend the general meeting, granted an injunction restraining the issue (65).

**531D. Construction of memorandum and articles :—**As regards the rights of the preference shareholders ordinarily, except in respect of such matters as must by statute be provided for by the memorandum of association, the latter is not to be regarded as the dominant document but is to be read in conjunction with the articles (66). But where the provisions of the memorandum with regard to the rights of the preference shareholders are neither ambiguous nor in need of being supplemented, the two documents should not be read together (67). Upon construction of the memorandum and articles of a company it has been held in England that where they contained an exhaustive delimitation of the rights of the preference shareholders, in the event of a winding up, the latter would be entitled to a return of their capital but not to participate in any surplus assets (68).

The capital of a company was divided into ordinary and preference shares which by the memorandum were to "have the rights specified in the articles". The articles provided for a preferential dividend, and for setting aside out of the net profits a sum equal to 20 p.c. of the amount of preference shares for the formation of a sinking fund to pay off the preference shares at the end of five years; subject to this, the rest of the net profits belonged to the holders of ordinary shares. The company proposed to pay off and cancel all the preference shares and presented a petition for reduction on this basis: *Held* that the memorandum and articles created a valid contract binding on both the classes of shareholders; that a portion of the profits should be set apart for the redemption and extinction of the preference shares; that

(61) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361; see also *London & New York Investment Corp.* [1895] 2 Ch. 860.

(62) *Andrews v. Gas Meter Co.*, *supra*. But see *Harrison v. Mexican Ry. Co.* [1875] L.R. 19 Eq. 358.

(63) *William Metcalfe & Sons (infra)*; *Anglo-French Music Co. v. Nicol* [1921] 1 Ch. 386; *Espuela Land & Cattle Co.* [1909] 2 Ch. 187; *Fraser & Chalmers Ltd.* [1919] 2 Ch. 114; but see *National Telephone Co.* [1914] 1 Ch. 755 and *Evling v. Israel & Oppenheimer Ltd.* [1918] 1 Ch. 101. See notes to s. 475.

(64) *Fraser v. Whalley* [1864] 2 H. & M. 10.

(65) *Hutton v. Scarborough Cliff Hotel Co.* [1865] 2 Dr. & Sm. 514.

(66) *Angostura Bitters Ltd. v. Kerr* [1933] A.C. 550 (P.C.); *Harrison v. Mexican Ry. Co.* [1875] 19 Eq. 358; *Anderson's case* [1877] 7 Ch. D. 75; *Guinness v. Land Corp. of Ireland* [1882] 22 Ch. D. 349; *South Durham Brewery Co.* [1883] 31 Ch. D. 261.

(67) *Angostura Bitters Ltd. v. Kerr (supra)*.

(68) *Collaroy v. Giffard* [1928] 1 Ch. 144. In this case all important previous decisions were discussed.



the reduction, as proposed, did not involve a payment to any shareholder of any paid up capital (69).

In a very recent case (70) upon construction of the articles of a company the Court of Appeal in England held that the words in the articles "and shall have priority as to dividend and capital over the other shares" referred to the rights in a winding up, as the word "preferential" used in the first part of the article showed that the dividend on these preference shares was to have priority and that the provision "as to dividend and capital" referred to a winding up.

### 531E. Rights of holders of preference, ordinary and deferred shares:—

Where there are preference shares and ordinary shares, the holders of both classes are, subject to any provision to the contrary, entitled to share *pari passu* in the surplus assets in the winding up, after paying up the whole of the capital (71). A preference share *prima facie* only gives right to a preferential dividend and not to a preferential payment of the amount of the share out of the capital in the case of a winding up (72).

Preference shares may however either give a preferential right only as to dividend or both as to dividend and to the return of capital (73). The preferential dividend may be cumulative or payable only out of the profits of each year. Preference shares are not *prima facie* entitled to receive any dividend beyond the fixed preferential dividend (74). The preference shares bear the same relation to the ordinary shares as the latter do to the deferred shares. Whatever preferences or postponements are intended to be created should be clearly set forth in the memorandum or the articles or in the special resolution authorizing the creation. If they are determined by the memorandum they cannot subsequently be waived (75), except where such variation is contemplated in the memorandum itself (76). But if it is provided in the articles only, the company may take power by special resolution to effect the necessary alteration (77).

Uncalled share money at the date of the winding up forms part of the assets or capital of the company. Where the preference shareholders are entitled in winding up to a return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to pay the preference share capital and which can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment is of course subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares (78). Where the memorandum of association provides: "No dividend shall be payable except out of the net profits arising from the business of the company," there can be no dividend payable to the preference shareholders from the amount of the share capital when there have been no profits, although under the articles preference shares confer the right to a fixed cumulative preferential dividend (78). But where preference shares were issued carrying a dividend at £10 p.c. p.a. payable half yearly, it was held that if the profits of any year were insufficient to pay the dividend in full, the deficiency might be made good out of subsequent profits (79).

(69) *Dicido Pier Co.* [1891] 2 Ch. 354.

(70) *F. de Jong & Co. Ltd.* [1946] 174 L.T. 299 (C.A.).

(71) *Bridgewater Navigation Co.* [1889] 14 App. Cas. 525.

(72) *London India Rubber Co.* [1868] 5 Eq. 519.

(73) *William Metcalf & Sons* [1933] 1 Ch. 142 (C.A.).

(74) *Will v. United Lankat Plantation* [1914] A.C. 11.

(75) *Ashbury v. Watson* [1885] 30 Ch. D. 376.

(76) See case note (59), *supra*.

(77) *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656.

(78) *D'Cruz v. Viswanathan* [1941] 2 M.L.J. 94.

(79) *Webb v. Earle* [1875] L.R. 20 Eq. 556.

The provision as to the preference does not give a preference in regard to the division of capital unless it is so expressly mentioned (80); and unless the rights of the preference shareholders are clearly expressed in the memorandum, articles or special resolution authorizing the creation, they may, upon a reconstruction of the company, find themselves reduced to the position of ordinary shareholders (81).

Where the articles were altered sanctioning the issue of preference shares and providing that the dividends on them should be paid out of profits only and that in the event of winding up the holders of the preference shares should be entitled to have the surplus assets applied *first* in paying off the capital paid on the preference shares, *secondly* in paying off the arrears of the preferential dividend, it was held that all unpaid preferential dividends were "arrears" of preferential dividends, although no profits had been earned by the company, so that subject to the payment off of the preference shares the surplus assets were applicable in the first place in paying off the whole of the preferential dividend down to the commencement of the winding up (82).

If the preference capital is repayable "with interest" this means with interest from the date of the winding up (83).

If preference shares are issued when there is no power to do so, or in an irregular manner, the subscribers thereof are entitled to have their money returned and they are creditors of the company (84).

Holders of ordinary shares cannot surrender their shares and receive in exchange preference shares of similar amounts (85).

If the right to a preference is conferred in the winding up, but is not further dealt with, the preference capital is to be repaid first, then the ordinary capital, and the surplus divided among both classes in proportion to the nominal amount of shares (86).

If it is provided in the memorandum or the articles that the rights of the holders of preference shares should come first, they cannot be postponed (87); but if the preference shares have been issued subject to the rights of the company to issue fresh capital having such preference and priorities as shall be agreed upon, the original preference shares may be postponed (88).

Where a company proposing to issue new preference shares ranking *pari passu* with its existing preference shares served notice on one of its shareholders (sued on behalf of himself and other preference shareholders) and an originating summons was issued for determination of certain questions with reference to the proposed issue, Buckley, J. refused to appoint the defendant to represent the class and said that he would not decide the question so as to bind the class of preference shareholders unless a meeting of them was first called which nominated a person to represent the class. He however decided the question as between the company and the defendant (89).

Where the articles provided: "Shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit and with full power to give

(80) Driffeld Gas Light Co. [1898] 1 Ch. 451.

(81) *Birch v. Cropper* [1880] 14 App. Cas. 525.

(82) *Springbok Estates Ltd.* [1920] 1 Ch. 563; *New Chinese Antimony Co.* [1916] 2 Ch. 115. In this case *re Hall & Co.* [1909] 1 Ch. 521 was not followed.

(83) *Espuela Land & Cattle Co.* [1909] 2 Ch. 187.

(84) *London & New York Investment Co.* [1895] 2 Ch. 860.

(85) *Adair v. Old Bushmills Distillery* [1908] W.N. 24; *Bellerby v. Rowland & Co.* [1902] 2 Ch. 14.

(86) *Espuela Land & Cattle Co.* (supra).

(87) *James v. Buena Ventura Syndicate* [1896] 1 Ch. 456.

(88) See case note (59), supra.

(89) *Morgan's Brewery Co. v. Crosskill.* [1902] 1 Ch. 898.

to any person the call of any shares either at par or at a premium and for such time and for such consideration as the directors think fit," it was held that the powers conferred on the directors included the power to control the character of the shares (90).

For other cases relating to the rights of preference shareholders as regards dividends, return of capital and income-tax payable see the cases noted below (91) decided on construction of the articles and special resolutions creating the preference shares.

**531F. Court's power** :—The Court has power in a proper case to confirm a resolution for reduction of capital notwithstanding that the voting powers may be thereby affected (92).

See notes to ss. 13 and 475 and reg. 88.

**86. New issues of share capital to be only of two kinds.**—The share capital of a company limited by shares formed after the commencement of this Act, or issued after such commencement, shall be of two kinds only, namely :—

- (a) equity share capital; and
- (b) preference share capital.

This was sub-s. (1) of s. 79 of the original Bill. See notes to s. 85.

**87. Voting rights.**—(1) Subject to the provisions of section 89 and sub-section (2) of section 92—

(a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and

(b) his voting right on a poll shall be in proportion to his share of the paid up equity capital of the company.

(2) (a) Subject as aforesaid and save as provided in clause (b) of this sub-section, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares.

**Explanation.**—Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause.

(90) *Campbell v. Rofe* [1933] A.C. 91 (P.C.).

(91) *Wharfedale Brewery Co.* [1952] 2 A.E.R. 635, *Goldfrey Phillips Ltd. v. Investment Trust Corpn.* [1953] 1 A.E.R. 7; *E.W. Savory Ltd.* [1951] 2 A.E.R. 1036; *John Smiths Tadmester Brewery Co.* [1952] 2 A.E.R. 751; *Duncan Gilmour & Co.* [1952] 2 A.E.R. 871; *Friends P. & C. Life Office v. Investment Trust Corpn.* [1951] 2 A.E.R. 632.

(92) *James Colmer Ltd.* [1897] 1 Ch. 524.

(b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid—

(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting ; and

(ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid

*Explanation.*—For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not,—

(a) on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf ; or

(b) in case no day is so specified, on the day immediately following such period.

(c) Where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this sub-section, his voting right on a poll, as the holder of such share, shall, subject to the provisions of section 89 and sub-section (2) of section 92, be in the same proportion as the capital paid up in respect of the preference share bears to the total paid up equity capital of the company.

This was Cl. 80 of the original Bill. See notes to s. 85.

With respect to this section the Joint Committee observes :—“The Bill as introduced (clause 80) provided that failure to pay the fixed dividend on the preference capital for a period of two consecutive years in the case of non-cumulative preference shares, and for a period of one year in the case of cumulative preference shares, should enable the holders of the preference shares to vote on all resolutions placed before the general meeting of the company, instead of only on resolutions which affect their special rights as preference shareholders. The Committee have altered this portion of original clause 80 so as to provide instead for general voting rights if at any time the dividend is in arrear in the case of cumulative preference shares, for an aggregate period of not less than two years (which need not be cumulative) or in the case of non-cumulative preference shares, either for a period of two years

immediately preceeding or for an aggregate period of not less than three years comprised in the six preceding years—See clause 86 (now s. 87).

"The definition of 'cumulative preference shares' has also been amplified so as to make it more accurate and applicable to all the cases which it is intended to cover.

"It has been made clear that dividend should be deemed to be due within the meaning of this clause, although no dividend has, in fact been declared on or before the last date on which the dividend has to be paid according to the articles or other instruments governing the matter" (*vide* J.C.R., para 41).

In this section in the Explanation to sub-s. (2) (a) before the word "reduction" the words "repayment or" have been inserted and for Explanations (1) and (2) to sub-s. (2) (b) only one Explanation containing (a) (b) and (c) has been substituted omitting the definition of "cumulative preference share" by the Lok Sabha.

**88. Prohibition of issue of shares with disproportionate rights.**—No company formed after the commencement of this Act, or issuing any share capital after such commencement, shall issue any shares (not being preference shares) which carry voting rights or rights in the company as to dividend, capital or otherwise which are disproportionate to the rights attaching to the holders of other shares (not being preference shares).

This was originally cl. 81 of the Bill. See notes to s. 85.

With respect to this section the Joint Committee observes :—"The Committee consider that there should be an absolute prohibition against the issue of shares with disproportionate voting rights after coming into force of this Bill. The clause has been amended accordingly" (*vide* J.C.R., para 42).

See notes to s. 85.

**89. Termination of disproportionately excessive voting rights in existing companies.**—(1) If at the commencement of this Act any shares, by whatever name called, of any existing company limited by shares carry voting rights in excess of the voting rights attaching under sub-section (1) of section 87 to equity shares in respect of which the same amount of capital has been paid up, the company shall, within a period of one year from the commencement of this Act, reduce the voting rights in respect of the shares first mentioned so as to bring them into conformity with the voting rights attached to such equity shares under sub-section (1) of section 87.

(2) Before the voting rights are brought into such conformity, the holders of the shares in question shall not exercise in respect thereof voting rights in excess of what would have been exercisable by them if the capital paid up on their shares had been equity share capital, in respect of the following resolutions placed before the company, namely :—

(a) any resolution relating to the appointment or re-appointment of a director or of a managing agent or

secretaries and treasurers, or to any variation in the terms of an agreement between the company and a managing or whole-time director thereof or its managing agent or secretaries and treasurers ;

(b) any resolution relating to the appointment of buying or selling agents ;

(c) any resolution relating to the grant of a loan or to the giving of a guarantee or any other financial assistance, to any other body corporate having any person as managing agent or secretaries and treasurers who is also either the managing agent or the secretaries and treasurers of the company or an associate of such managing agent or secretaries and treasurers.

(3) If, by reason of the failure of the requisite proportion of any class of members to agree, it is not found possible to comply with the provisions of sub-section (1), the company shall, within one month of the expiry of the period of one year mentioned in that sub-section, apply to the Court for an order specifying the manner in which the provisions of that sub-section shall be complied with ; and any order made by the Court in this behalf shall bind the company and all its shareholders.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

(4) The Central Government may, in respect of any shares issued by a company before the 1st day of December, 1949, exempt the company from the requirements of sub-sections (1), (2) and (3), wholly or in part, if in the opinion of the Central Government the exemption is required either in the public interest or in the interests of the company or of any class of shareholders therein or of the creditors or any class of creditors thereof.

Every order of exemption made by the Central Government under this sub-section shall be laid before both Houses of Parliament as soon as may be after it is made.

This was originally cl. 82 of the Bill. See notes to s. 85.

With respect to this section the Joint Committee observes :—“The Committee have provided for every order of exemption from the provisions of sub-clause (1), (2) or (3) being laid before both Houses of Parliament.

“The recommendations of the Company Law Committee in paragraph 48 (vi) of their report with regard to shares issued with disproportionate voting rights before the 1st December, 1949, has also been given effect to in this section” (*vide* J.C.R., para 43).

Sub-s. (2) (a) of this section has been altered by the Lok Sabha by including a director and a managing or whole time director.

See notes to s. 85.

**90. Savings.**—Nothing in sections 85 to 89 shall,—

(a) in the case of any shares issued before the commencement of this Act, affect any voting rights attached to the shares save as otherwise provided in section 89, or any right attached to the shares as to dividend, capital or otherwise ; or

(b) apply to a private company, unless it is a subsidiary of a public company.

This was originally cl. 83 of the Bill. See notes to s. 85.

*Miscellaneous provisions as to share capital*

**91. Calls on shares of same class to be made on uniform basis.**—Where after the commencement of this Act, any calls for further share capital are made on shares, such calls shall be made on a uniform basis on all shares falling under the same class.

*Explanation.*—For the purposes of this section, shares of the same nominal value on which different amounts have been paid up shall not be deemed to fall under the same class.

This was originally cl. 84 of the Bill.

With respect to this section the Joint Committee observes : —“An explanation has been added, making it clear that shares though of the same nominal value, will belong to different classes, if the amounts paid up on the shares are different” (*vide* J.C.R., para 44).

**92. Power of company to accept unpaid share capital, although not called up.**—(1) A company may, if so authorised by its articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up.

(2) The member shall not however be entitled, where the company is one limited by shares, to any voting rights in respect of the moneys so paid by him until the same would, but for such payment, become presently payable.

This was originally cl. 85 of the Bill. It corresponds to sub-ss. (2) and (3) of s. 49 of the previous Act and s. 59 of the English Act of 1948. The provision of cl. (a) respectively of those sections, which authorises the company to differentiate between the shareholders in the amounts and times of payment of calls, has not been embodied in this section, as it is considered that this power is open to abuse. It

does not also seem to be necessary that when shares are issued at the same time, different provision should be made in regard to the amounts, or the times of payment, of call on the shares—*Notes on Clauses*.

The Joint Committee have added a sub-section [sub-s. (2)] to this section making it clear that the payment of any amount voluntarily, towards the uncalled share capital, will not give voting rights in respect of that amount (*vide* J.C.R., para 45).

**93. Payment of dividend in proportion to amount paid up.**—A company may, if so authorised by its articles, pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

This new section has been added by the Joint Committee providing for payment of dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others, if so authorised by the articles of the company. Such a provision occurred in the previous Act [s. 49 (3)] and should be retained to remove all doubts on the point (*vide* J.C.R., para 46).

**532.** :—In the absence of such a clause in the articles of association, members are entitled to dividend in proportion to the nominal value of their share, and not in proportion to the amount paid thereon (93). Payment of dividend in proportion to the amount paid up on each share was for the first time authorised in Table A of the Act of 1913 (94).

**94. Power of limited company to alter its share capital.**—(1) A limited company having a share capital, may, if so authorised by its articles, alter the conditions of its memorandum as follows, that is to say, it may—

(a) increase its share capital by such amount as it thinks expedient by issuing new shares ;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;

(c) convert all or any of its fully paid up shares into stock, and reconvert that stock into fully paid up shares of any denomination ;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed

(93) *Oakbank Oil Co. v. Crum* [1882] 8 App. Cas. 65.

(94) *Vide* reg. 88 (1) of the present Act and notes thereto and reg. 98 of the old Act ; cf. reg. 72, Table A of the Act of 1882.



to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section shall be exercised by the company in general meeting and shall not require to be confirmed by the Court.

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

This was originally cl. 86 of the Bill. It corresponds to s. 50 of the previous Act and s. 61 of the English Act of 1948. Provision was made in sub-s. (1) (a) for increasing the share capital by adding to the amount paid up on the existing shares, but it was made clear that the addition should be made from the accumulated profits, reserves or capital moneys of the company and that no fresh liability should be imposed on the shares—*Notes on Clauses*. This provision has however been omitted by the Joint Committee.

**533. Notice to Registrar—penalty** :—When a company takes action under cl. (a), for notice to the Registrar and penalty for not giving it, see s. 97. When it takes action under other clauses, for such notice and penalty, see s. 95.

**533A. Sub-s (1), Cl. (a).** :—This clause provides for increasing the company's share capital by *issuing* new shares. This appears to be the same thing as increasing the subscribed capital by the issue of new shares mentioned in s. 81 *ante*, which specifies the mode in which such increase can be effected. This power can be exercised by the company in general meeting by an ordinary resolution.

A company having a share capital is registered with a certain amount of authorised capital which may be issued wholly or partly as needs arise. It is difficult to understand why authorisation in the articles [as provided in sub-s (1) of the present section] is necessary for such issuing, while no provision has been made in the Act for increasing the authorised capital of a company which should require authorisation by the articles. All that is provided in s. 97 is that where a company has increased its share capital beyond the authorised capital, it shall file with the Registrar notice of such increase. In view of this an express provision should have been made in the Act for increasing the authorised capital of a company. Cl. (a) of sub-s. (1) of the present section should have been, it is submitted, in the same terms as in reg. 44 of the present Table A or in other suitable terms.

**534. The power is fiduciary** :—The power to increase capital by the issue of new shares is a fiduciary power to be exercised by the directors *bona fide* for the general advantages of the company and they are not entitled to use their powers merely for the purpose of maintaining their control over the affairs of the company and for defeating the wishes of the existing majority of shareholders (95).

**535.** The company can, "if so authorised by its articles", do the things authorized in the manner authorized. But if not so authorized by the articles, the company may take the necessary powers (96) by altering the articles in the mode provided by s. 31.

(95) *Piercy v. S. Mills & Co.* [1920] 1 Ch. 77.

(96) See *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 118; *Imperial Hydropathic Hotel Co. v. Hampson* [1883] 23 Ch. D. 1.

**536. Suit by shareholder :—**A suit by a shareholder for a declaration that the allotment of new shares to certain persons is not legal and that they have no powers as shareholders on the ground that the resolution authorizing the increase of capital by issuing new shares was invalid and ineffective, does not lie. Where no consequential relief, such as a prayer for rectification of the register of members by removing the names of new shareholders or for an injunction, is sought, the suit comes within the mischief of s. 42 of the Specific Relief Act and is consequently bad (97).

**537. How and when directors exercise power :—**Where the articles provide merely that "the company may increase its capital" without saying how, the company can exercise the power of increase (98). But where the articles do not contain the requisite authority to increase, they should be amended by "special resolution", and the alteration of the articles as well as that of the capital may be effected by one resolution (98). If the company passes a special resolution authorizing the creation and issue of new shares, that will in effect not only give authority to increase, but enable the directors to exercise that authority (99).

Where a company had power in its articles to increase its capital without a "special" resolution, it was unnecessary to do more than pass an ordinary resolution; or the company might confer on its directors the power to make the increase (1). But it was otherwise if other articles required the sanction of the company in general meeting (2). In that case a single shareholder holding all the shares of a class might constitute the meeting (3). Sub-s. (2) of this section provides that the powers conferred by this section must be exercised by the company in general meeting, but an ordinary resolution is sufficient. The intention to make the specific increase of capital must be embodied in the resolution (4).

Where the articles provided that the existing shareholders should have the option of taking the shares in the increased capital rateably and in proportion to their respective shares, a deviation from the provision cannot be made unless with the assent of all the shareholders (5). On the increase of capital the new shares shall be offered to the members in proportion to their existing shares (6). See s. 81 and notes.

**538. Agreement between company and vendor :—**An agreement between a company and the vendor providing that on any future increase of capital the company will allot to the vendor a certain proportion of the new shares and will pay to him a sum equal to the nominal amount of the shares so allotted, such sum to be immediately applied in paying up in full the shares so allotted, is good so far as the obligation to the allotment goes, but is bad so far as it purports to relieve the allottee from liability to pay up the nominal amount of the shares allotted (7).

**539. Fees and stamp :—**In England stamp duty is to be paid on the amount by which the nominal capital is increased (8): registered capital means authorized capital. As to the fees for registration of increase of capital see Schedule X.

(97) *Jogesh v. Durga Mohan* [1932] C. 714, 36 C.W.N. 638, 140 I.C. 76.

(98) *Campbell's case* [1873] 3 Ch. App. 1; see also *Moseley v. Koffyfontein Mines* [1910] 2 Ch. 382, 389.

(99) Held by the Full Court of Appeal in *Campbell's case* (supra).

(1) *Moseley v. Koffyfontein Mines* (supra).

(2) *Koffyfontein Mines v. Moseley* [1911] 1 Ch. 73, on appeal [1911] A.C. 409.

(3) *East v. Bennett Brothers* [1911] 1 Ch. 163.

(4) *Mc Connel v. E. Prill & Co.* [1916] 2 Ch. 57.

(5) *Eastern F. Association v. Pestonje* [1866] 3 Bom. H.C.R. 9 (O.C.).

(6) *James v. Buena Ventura & Co. Syndicate* [1896] 1 Ch. 456.

(7) *Hongkong & China Gas Co. v. Glen* [1914] 1 Ch. 527.

(8) *Attorney General v. Anglo-Argentine Tramways Co.* [1909] 1 K.B. 677.

The authority to increase is to be contrasted with the authority to reduce which authority can only be exercised by special resolution (9).

**540. Cl. (b). Consolidation of shares :—**If the alteration does not involve consolidation or division of shares and does not involve an alteration of the memorandum of association, separate meetings of the classes are not required (10). Where this is the case, the rights are frequently altered by an arrangement under s. 391 (11). If it does not involve any alteration of the memorandum, it may be done by special resolution without the sanction of the Court (12).

**541. Cl. (c). Conversion of shares into stock and re-conversion :—**When shares have been fully paid up, but not before (13), they may be turned into stock of which notice must be given to the Registrar under the next following section. The issue of partly paid up stock would be a nullity (13). For distinction between share and stock see notes to s. 95.

**542. Cl. (d). Sub-division of shares :—**If no power is given either in the memorandum or the articles of association to sub-divide the share capital or to create any preference between different classes of shares, the company can take the power by altering the articles (14). If the articles did not contain the requisite authority to sub-divide, they could be amended by special resolution and then the power had to be exercised by subsequent special resolution. The two successive resolutions might be passed in three meetings (15). But now two meetings are not required for passing a special resolution (see s. 189).

**543.** When a reduction of capital has created shares not consisting of an integral amount, such shares may be consolidated and then sub-divided into shares of integral amount (16). The section permits a consolidation of shares followed by a sub-division resulting from such consolidation to be carried out by a single resolution (17).

**544. Court's sanction when necessary :—**In spite of the provisions of this section, a scheme of reduction of capital may be sanctioned by the Court under s. 100 (18). A company registered under the previous Acts may, with the confirmation by the Court, alter its objects or substitute a memorandum and articles for its deed of settlement without registering it under this Act (19).

All the powers mentioned in this section may be exercised contingently on the confirmation by the Court of a resolution for reduction of capital (20), and a single resolution for consolidation and sub-division of shares resulting from such consolidation may be valid (21).

(9) Vide s. 100.

(10) *Re J. A. Nordberg Ltd.* [1915] 2 Ch. 439; *Re Schweppes Ltd.* [1914] 1 Ch. 322.

(11) See notes to s. 391.

(12) *Australian Estates Co.* [1910] 1 Ch. 414.

(13) *Home & Foreign Investment Co.* [1912] 1 Ch. 72.

(14) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361.

(15) *John Crossly & Sons* [1892] W.N. 55; but see sub-s. (2).

(16) *North Cheshire Brewery Co.* [1920] W.N. 149, 64 S.J. 463.

(17) *Campbell's case* (supra).

(18) *Doloswella R. & T. Estates* [1917] 1 Ch. 213.

(19) SS. 561 & 562; *re Hongkong & China Gas Co.* [1898] W.N. 158; *re Copiapo Mining Co.* [1899] W.N. 25, 6 Mans. 320; *Euphrates & Tigris & Co.* [1904] 1 Ch. 360.

(20) *Salinas of Mexico* [1919] W.N. 311; *Australian Estates Co.* [1910] 1 Ch. 414, 425; *Welsbach I. G. Light Co.* [1904] 1 Ch. 87, 91.

(21) *North Cheshire Brewery Co.* (supra).

**95. Notice to Registrar of consolidation of share capital, conversion of shares into stock, etc.—**(1) If a company having a share capital has—

- (a) consolidated and divided its share capital into shares of larger amount than its existing shares ;
  - (b) converted any shares into stock ;
  - (c) re-converted any stock into shares ;
  - (d) sub-divided its shares or any of them ;
  - (e) redeemed any redeemable preference shares ; or
  - (f) cancelled any shares, otherwise than in connection with a reduction of share capital under sections 100 to 104 ;
- the company shall within one month after doing so, give notice thereof to the Registrar specifying, as the case may be, the shares consolidated, divided, converted, sub-divided, redeemed or cancelled, or the stock reconverted.

(2) The Registrar shall thereupon record the notice, and make any alterations which may be necessary in the company's memorandum or articles or both.

(3) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section corresponds to s. 51 of the previous Act and s. 62 of the English Act of 1948—*Notes on Clauses*.

The time for giving notice to the Registrar was extended to one month in place of 15 days in s. 51 of the previous Act.

**545. Distinction between "share" and "stock"** :—For the meaning of the word "stock" see notes to s. 84. The distinction between "share" and "stock" was explained by Lord Cairns in *Morrice v. Aylmer* (22) where it was pointed out that when converted into stock the shares might be assigned in fragments ; but the stock should still be the qualification of directors and that meetings should be of persons entitled to this stock who meet and vote as shareholders in the proportion of shares which would entitle them to vote before the consolidation into stock.

One of the conveniences of stock, besides its divisibility, is that it becomes no longer necessary in a transfer to specify all the numbers of various shares comprised in the transfer: a transfer is made of so much stock.

A bequest of shares would include stock ; but a direction in a will to invest in preference stock does not justify investment in preference shares (23). If stock is issued as partly paid up, the issue is void (23). But the irregularity committed by a company in issuing fully paid stock without first issuing shares is a mere irregularity which will not in equity be held to avoid the transaction, but can be ignored (24).

(22) [1875] 10 Ch. App. 148 at p. 154.

(23) *Re Willis* [1911] 2 Ch. 563.

(24) *Home & Foreign Investment Co.* [1912] 1 Ch.

**96. Effect of conversion of shares into stock.**—Where a company having a share capital has converted any of its shares into stock, and given notice of the conversion to the Registrar, all the provisions of this Act which are applicable to shares only, shall cease to apply as to so much of the share capital as is converted into stock.

See s. 52 of the previous Act and s. 63 of the English Act of 1948—*Notes on Clauses.*

The original cl. 89 of the Bill dealing with the power of company not having a share capital to increase its membership has been omitted by the Joint Committee with the following remark :—“In view of the provision contained in clause 96 (now s. 97), the Committee consider this clause to be redundant. The clause has therefore been omitted” (*vide* J.C.R., para 47).

**97. Notice of increase of share capital or of members.**—(1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the authorised capital, and where a company, not being a company limited by shares, has increased the number of its members beyond the registered number, it shall file with the Registrar, notice of the increase of capital or of members within fifteen days after the passing of the resolution authorising the increase ; and the Registrar shall record the increase and also make any alterations which may be necessary in the company’s memorandum or articles or both.

(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions, if any, subject to which the new shares have been or are to be issued.

(3) If default is made in complying with this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section corresponds to s. 53 of the previous Act and s. 63 of the English Act of 1948. Only some drafting changes have been made—*Notes on Clauses.*

**98. Power of unlimited company to provide for reserve share capital on re-registration.**—An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely :—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but

subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up ;

(b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

This section corresponds to s. 68 of the previous Act and s. 64 of the English Act of 1948. Originally it was cl. 9 of the Bill. The Joint Committee have made some changes in this section with the following observation: "The original clause was a reproduction of s. 68 of the Indian Companies Act of 1913, with the omission of certain words. The Committee have restored the wording of s. 68 (*vide J.C.R.*, para 48).

**99. Reserve liability of limited company.**—A limited company may, by special resolution, determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in that event and for those purposes.

This section corresponds to s. 69 of the previous Act and s. 60 of the English Act of 1948.

**546. Reserve capital** :—After the special resolution such a capital cannot be charged by the company under a power in its memorandum and articles of association to charge its uncalled capital (25). Reserve capital cannot be turned into ordinary capital without leave of the Court and it cannot be dealt with by the directors. The reserve capital cannot be cancelled in a reduction of capital (26).

### *Reduction of Share Capital*

**100. Special resolution for reduction of share capital.**—(1) Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital in any way ; and in particular and without prejudice to the generality of the foregoing power, may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up ;

(b) either with or without extinguishing or reducing

(25) *Bartlett v. Mayfair Property Co.* [1898] 2 Ch. 28 ; *Irish Club Co.* [1906] W.N. 127 ; *Re Pyle Works* [1890] 44 Ch. D. 586 (587).

(26) *Midland Ry. Carriage Co.* [1907] W.N. 175.

liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets ; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company ;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as “a resolution for reducing share capital”.

Cls. 93 to 97 (now ss. 100 to 105) are based on ss. 55-66 of the previous Act and ss. 66-71 of the English Act of 1948. The sections have been rearranged on the lines of the English Act.—*Notes on Clauses.*

S. 100 corresponds to s. 55 of the previous Act and s. 66 of the English Act of 1948.

**547. Principle :—**In an application for reduction of capital under this section the following principles are applicable: (1) The company has power to reduce its capital ; (2) subject to confirmation by the Court, which is the safe-guard of the minority, the question of reducing capital is a domestic one for the decision of the majority ; (3) the company is to determine the extent, the mode and incidence of the reduction ; (4) the company may reduce the share capital of all its shareholders wholly or in part ; (5) the Court has to see that interests of the minority have been protected and no unfairness has been shown to it ; (6) in doing so the Court should keep in view the consideration that the decision has been arrived at by business men who are fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere (27). Without throwing any doubt on the general proposition that shareholders acting honestly are usually better judges of what is to their commercial advantage than the Court, where it is proved that the majority of a class may have voted in the way they did because of their interests as shareholders in another class, little attention should be paid to the vote of the majority in considering whether the scheme is fair (28). In such a case the Court should itself decide the question of fairness or unfairness on the evidence before it (29).

**548. Reduction without Court's sanction :—**A company may reduce its capital without the sanction of the Court by—(a) forfeiting shares for non-payment of calls and the like, (b) paying off paid up capital out of accumulated profits (30) and (c) cancelling shares by ordinary resolution under s. 94, sub-section (1), cl. (e). A surrender of shares in consideration of a payment in money or money's worth by the company is a purchase by it of its own shares and is *ultra vires* (31). “Every surrender of shares, whether fully paid up or not, involves a reduction of capital which is unlawful, except where sanctioned by the Court. Forfeiture is a statutory and the only

(27) *Khattar Electrical Engineering & Co.* [1938] Pesh. 41, where the relevant English cases have been discussed.

(28) *Carruth v. Imperial Chemical Industries* [1937] A.C. 707, per Lord Maugham.

(29) *Ibid*, per Lord Russell of Killowen.

(30) *Neale v. City of Birmingham Tramways Co.* [1910] 2 Ch. 464.

(31) *Trevor v. Whitworth* [1887] 12 App. Cas. 409.

exception" (32). A surrender of shares to the company not involving any reduction of capital and not amounting to a purchase of its own shares is not however necessarily *ultra vires* (33). It may be done where a forfeiture can be justified (34). Surrender in all other cases is illegal (35).

**549. "Capital"** :- In speaking of reduction of capital, the word "capital" means neither nominal capital to the exclusion of paid up capital, nor the latter to the exclusion of the former. A reduction of nominal capital which is paid up must be so made as not to affect the equilibrium of the company's balance-sheet to the prejudice of the company's creditors. This equilibrium is not disturbed where the reduction is effected, (a) by cancelling capital lost or unrepresented by available assets, or (b) by paying off capital in excess of the company's wants, because in either case the balance item on the debit or credit side of the balance sheet, as the case may be, is unaffected; but the section impliedly forbids the writing off of paid up capital which is not lost or unrepresented by available assets or returned, the result in that case being to disturb the equilibrium of the balance sheet by striking out of the debit or liability side a sum representing paid up capital, leaving the credit or assets side unaffected (36).

When the directors knowing that the company is insolvent make payment of sums of money representing the uncalled capital due by them for shares, such payment will be treated as payment towards capital and not as a loan (37).

**550. Authorization in articles necessary** Reduction of capital cannot be effected unless it is authorized by the articles as originally framed or altered by special resolution (38). power in the memorandum of association being ineffective (39). This statutory power cannot be fettered (40). A company not having powers by its articles to reduce the capital, can take the power by passing a special resolution and at the second meeting exercise the power (41). Where a company had taken power by its articles to reduce its capital in any way in which under the statute it was authorized to do, it was held by the House of Lords that a scheme of reduction affecting the deferred shareholders only was not *ultra vires* and that the scheme was fair to both classes of shareholders (42). In the last cited case Lord Blanesburgh was of opinion that although, if the question had been open, the meeting of the deferred shareholders (not being a meeting exclusively attended by these shareholders) was not a separate meeting, the resolution approving the scheme must be taken to have been duly passed, as it had not been challenged by the appropriate procedure. But in the same case Lord Russell of Killowen and Lord Maugham expressed the opinion that although *prima facie* a separate meeting of a class should be a meeting attended only by members of that class, the meeting of the deferred shareholders having been properly convened, the presence of shareholders of another class was a matter relating to the conduct of the meeting, which lay in the hands of the chair

(32) *Per Cozens-Hardy L. J.* in *Bellerby v. Rowland & Marwoods Steamship Co.* [1902] 2 Ch. 14 at p. 32. See also *Official Liquidator v. Suleman* [1955] M.B. 166.

(33) *Rowell v. John Rowell & Sons* [1912] 2 Ch. 609; see also *Denver Hotel Co.* [1893] 1 Ch. 495.

(34) *Bellerby v. Rowland & Marwoods Steamship Co.* [1902] 2 Ch. 14.

(35) Lord Wallscourt's case [1899] W.N. 250, 7 Mans. 235.

(36) *Anglo-French Exploration Co.* [1902] 2 Ch. 845 judgment of Buckley J.

(37) *Hari Ram v. Commercial Bank* [1921] 19 A.L.J. 445, 62 L.C. 889.

(38) *Patent Invert Sugar Co.* [1885] 31 Ch. D. 166; *Oregon Mortgage Co.* [1910] S.C. 964.

(39) *Dexine P. P. & Rubber Co.* [1903] 88 L.T. 791, [1903] W.N. 82.

(40) *Ayre v. Skelsev's A Cement Co.* [1903] 20 T.L.R. 587, on appeal [1906] 21 T.L.R. 464.

(41) *John Crossley & Sons* [1892] W.N. 55.

(42) *Carruth v. Imperial Chemical Industries* [1937] A.C. 707.



man with the assent of those persons who were properly present and constituted the meeting, and as no objection was taken at the meeting, those present must be taken to have assented to the meeting being so conducted, and the resolution was accordingly valid.

It was not competent for a company to pass resolutions at the same extraordinary general meeting, *first* authorizing the reduction and *secondly* providing for the reduction in a certain way; for at the time the latter resolution was passed, there was no power to reduce, as the former resolution could not be effective until confirmed at a subsequent meeting (43).

**551. How reduction is to be effected** :— *Prima facie* a reduction of capital should be an all round one, *i.e.*, the same percentage should be paid off or cancelled or reduced in respect of each share, and the *pari passu* mode of reduction is the proper mode where there are several classes of shares (44), unless the preference shares have priority as regards capital in the winding up (45), in which case the loss should be thrown first on the ordinary shares (46). The Court has however jurisdiction to confirm any kind of reduction subject to the creditors' right to object, notwithstanding that it affects the legal rights of classes (47). To give the Court jurisdiction to entertain a petition for reduction, it is not essential to prove that the capital proposed to be cancelled is lost or unrepresented by available assets (47). But if a resolution for reduction is in fact unfair, even the objection of a few opponents will prevail (48). It is however no part of the business of a Court of Justice to determine the wisdom of a course adopted by a company in the management of its own affairs (48).

In considering the reduction of share capital the shareholders might decide to accept a transfer of assets to a holding company the shares of which were to be held by them according to their respective interests in the capital of the transferor company and they could also decide that the transfer should be of such investment as were according to their value in the company's balance-sheet, the equivalent of the amount of the proposed reduction of share capital; such a transaction was not rendered incompetent by the fact that the value of the transferred assets exceeded the amount by which the share capital of the transferor company was to be reduced, though in such a case it would be right for the Court closely to scrutinize the facts so as to insure that the rights of the creditors of the transferor company, the shareholders, and the investing public should not be defeated or injured (49). The possibility that the industry in which the company was engaged might be nationalised as the result of future legislation was not a ground on which the Court should refuse to confirm the reduction, though it might be a good reason for making quite certain that the existing law was complied with in every respect (49). How much of the paid-up share capital the company could dispense with for the future was a domestic matter which the shareholders and their managers must decide among themselves. If the amount which they had decided on worked no injustice to creditors or shareholders, the Court should not be concerned to know the precise figure by which the company's capital was surplus to its requirements (49).

(43) Oregon Mortgage Co. (supra); but confirmation is no longer necessary, see 189.

(44) House Property & Investment Co. [1912] 50 S.J. 505, [1912] W.N. 110.

(45) Credit Assurance & Co. Corporation [1902] 2 Ch. 601.

(46) London & New York Corpn. [1895] 2 Ch. 860; Floating Dock Co. of St. Thomas [1895] 1 Ch. 691.

(47) Poole v. National Bank of China [1907] A.C. 229; Louisiana &c. Mortgage Co. [1909] 2 Ch. 552; Credit Assurance &c. Corporation (supra); British & A. T. &c. F. Corpn. v. Couper [1894] A.C. 399.

(48) Per Lord Loreburn L. C. in Poole v. National Bank of China (supra) at p. 236.

(49) Westburn Sugar Refineries Ltd. [1951] 1 A.E.R. 881 (H.L.).

Where under the memorandum and articles of association, preference shareholders have no priority as to capital or voting powers but are merely entitled to a fixed cumulative dividend and the company has power to reduce capital, a rateable reduction on all the shares, preference and ordinary, though diminishing the actual preferential dividend, is not an alteration of the rights of the preference shareholders so as to require their sanction under an ordinary modification of rights clause (50). But where it becomes necessary to cancel arrears of preference dividends, it requires an arrangement under s. 391 (51), unless the memorandum or the articles vest the requisite power in a class meeting (52).

A guarantor of preference dividends, who had made payments pursuant to the guarantee, can claim only to be subrogated to the rights of preference shareholders, and cannot claim to be repaid as a creditor by the company (53).

A scheme for reduction comes within the operation of this section, although it differentiates between the holders of the same class of shares to the extent of paying off some and not others and imposes upon the shareholders, whose shares are to be extinguished, the obligation to accept debenture stock in lieu of cash and also involves the advance to the company of the moneys to be utilized in redemption of the share capital by the very persons whose shares are to be redeemed (54). The Court may make it a term of the confirmation that the cost of a dissentient shareholder who has assisted the Court by his criticism of the scheme shall be provided for by the company (54).

A reduction of capital may, with the sanction of the Court, be effected in any manner even though it involve doing things which without such sanction are entirely forbidden, e.g., the purchase by the company of its own shares, or a re-arrangement of the rights of the members (55), or a sub-division of shares in which the amount unpaid is not equally divided between the resulting shares (56).

Where on the ordinary £ 5 shares of a company, there were 6,047 fully paid shares and 53,953 shares which were paid up only to the extent of £ 1 per share, and the company, having accumulated a large reserve fund, passed and confirmed a special resolution for the return of £4 per share on the 6,047 fully paid shares, it was held that the company had power to reduce the paid up capital in the manner proposed by the special resolution (57).

A petition to the Court for confirmation of a scheme for reduction of capital was opposed by the deferred shareholders. The scheme was that every 2 l. of ordinary share should be converted into 1 l. of ordinary share; but the reduction was thought advisable having regard to the conflict of interests between the ordinary and the deferred share capital on any dividend distribution. Article 44 of the company's articles of association gave power to reduce the capital by paying off capital, cancelling capital lost or unrepresented by available assets, or reducing the liability on the shares or otherwise as might seem expedient. Arts. 71 and 72 required the assent of each class of shareholders by an extraordinary resolution passed at a meeting of such class. There was no suggestion of any want of good faith on the part of the directors: held (1) that Art. 44 was sufficient to allow reduction in the manner proposed; (2) that there was a proper holding of a separate meeting of each class

(50) *Mackenzie & Co.* [1916] 2 Ch. 450.

(51) *Australian Estates &c. Co.* [1910] 1 Ch. 414. *Hoare & Co.* [1910] W.N. 87.

(52) *Hoare & Co.* [1904] 2 Ch. 208.

(53) *Walter's Deed of Guarantee* [1933] 1 Ch. 321.

(54) *Thomas De La Rue & Co.* [1912] 2 Ch. 361. In this case a dissentient shareholder was compelled to receive  $4\frac{1}{2}\%$  debentures for  $5\frac{1}{2}\%$  cumulative preference shares.

(55) *British & A. T. &c. Corporation v. Couper* [1894] A.C. 399; *Credit Assurance &c. Corporation* (supra).

(56) *Doloswella Rubber Estates* [1917] 1 Ch. 213.

(57) *Neale v. City of Birmingham Tramways Co.* [1910] 2 Ch. 464. [1910] W.N. 175.

of shareholders, though at such a meeting shareholders of other classes were present without voting; (3) that a circular sent with the notice of the meeting was sufficient to convey all the information necessary, and any imperfection in it had not caused any misapprehension; (4) that it was not necessary that the circular should disclose the holdings of the directors in the various classes of shares; and (5) that although the scheme conferred a power on the majority to bind a minority, the Court ought to approve it as one for the benefit of that class, and it was a question in any case which could be far better decided by the shareholders themselves (58).

Reduction of capital cannot be effected as a scheme under s. 391 *post*, unless the proper steps are also taken under ss. 100 to 105.

**552. Where reserve fund is mixed with general assets :—**If there is a reserve fund which is mixed with the general assets of the company and allowed to rest in account only, as is often done, the general rule is to attribute to the reserve fund the same proportion of any loss of capital as the amount of the reserve fund bears to that of the nominal capital (59).

**552A. Forfeiture and surrender of shares :—**Where shares have been forfeited, the amount paid up before forfeiture may be written off and the shares treated as having nothing paid thereon (60). Fully paid up shares cannot be forfeited and therefore cannot be validly surrendered, even as a gift, to the company (61). A surrender or forfeiture of shares is in fact a reduction, and it cannot be done without the Court's sanction (62). The directors have no power to release a shareholder who wishes to have his shares cancelled (63).

**552B. Reduction of paid up capital only :—**A company may by special resolution reduce its paid up capital without reducing its nominal capital, the special resolution being to the effect that the accumulated profits shall be returned to the members in reduction of the amount paid up on the shares, the liability on the shares being increased by the same amount. If this repayment is made out of the profits, the Court's sanction is not required (64). Capital may be diminished by cancelling shares which have not been taken or agreed to be taken. This may, if the articles so provide, be done by an ordinary resolution; *vide* s. 94 (1), cl. (c). Where a cancellation of shares is not permissible under s. 94, the Court may sanction such reduction of capital under this section if the provisions hereof are complied with (65). Shares once duly issued cannot be cancelled at the request of the holder of such shares, for this will amount to a reduction of capital (66).

**552C. Special resolution :—**The power of reduction must be exercised by passing a special resolution. If minutes are properly signed, no evidence will be required to prove that the meetings were properly convened (67). Where of twelve shareholders present at the general meeting eight voted for and two against reduction and the remaining two did not vote, it was held that the resolution was not effective inasmuch as a majority of three-fourths of the members entitled to vote

(58) *Imperial Chemical Industries, Ltd.* [1936] 151 L.T. 705 (C.A.).

(59) *Hoare & Co* (supra).

(60) *Victoria (Malaya) Rubber Estates* [1914] W.N. 307, 58 S.J. 706.

(61) *Bellerby v. Rowland & Marwoods Steamship Co.* [1902] 2 Ch. 14.

(62) *Munt's case* [1852] 22 Beav. 55; *Spackman v. Evans* [1868] L.R. 3 H.L. 171; *Houldsworth v. Evans* [1868] L.R. 3 H.L. 263; *Collector of Moradabad v. Equity Insurance Co.* [1948] O. 197, 23 Luck 210, [1948] O.W.N. 197.

(63) *Adam's case* [1872] L.R. 13 Eq. 474.

(64) *See Neale v. City of Birmingham Tramways Co* (supra).

(65) *Doloswella Rubber Estate* (supra).

(66) *Purmanand v. Cormack* [1882] 6 Bom. 326.

(67) *Leicester Mortgage Co.* [1894] W.N. 108 (116), 38 S.J. 531 (564); *Omnium Investment Co.* [1895] 2 Ch. 127.

and present at the meeting (68) had not voted in favour of the resolution (69). The words "in any way" in sub-section (1) gives effect to the decision of the House of Lords in *Poole v. National Bank of China* (70).

**552D. Notice of meeting :—**Shareholders who have registered addresses in enemy occupied countries cannot be served with notices of the extraordinary meeting to pass the required special resolution for reduction of share capital and the absence of notice on such members does not invalidate the resolution (71).

**552E. Where capital consists of stock only :—**Where the capital consists only of stock, a reduction can be effected by cancelling a part of the stock. In such a case the holding of each stock-holder could be reduced by so much per cent. being the proportion which the sum to be written off bears to the amount of the issued stock (72).

**552F. Cl. (b) :—**Where a company proposed to pay off and cancel all the preference shares and presented a petition for reduction on this basis, it was held that the proposed reduction did not involve a payment to any shareholder of any paid up capital (73).

**552G. Cancellation of capital :—**It is not always necessary or essential for the Court to which a petition for reduction of capital is presented to satisfy itself that there has been a loss of capital. The only serious question is whether or not the company had duly passed its special resolution (74). Where however the reduction of the capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence (75). Where the person opposing the petition accepts the statement of the company that there has been loss of capital, the Court should act upon the assumption that there is evidence of loss of capital (75). Where such an application is opposed by a shareholder on the ground that certain persons who have voted for the resolution for reduction of capital were not duly qualified as shareholders to vote, but no steps have been taken to have the register of members rectified under s. 155, the onus is on the shareholder opposing the petition to substantiate his allegation (75).

**552H. Cl. (c) :—**This includes capital which can only be called up in case of the company going into liquidation (76). The petition and affidavit should state the fact that the amount to be returned is in excess of the company's requirements (77).

**552I. Court's power is discretionary :—**Reduction of capital may be sanctioned or disallowed at the discretion of the Court (78); so any scheme which works unfairly as regards the interest of the minority may be disapproved (78). But a fair scheme will be sanctioned, even if it effects an alteration of the respective rights of classes of shareholders (79).

(68) Vide s. 189.

(69) *John T. Clarke & Co.* [1911] S.C. 243.

(70) [1907] A.C. 229.

(71) *Anglo-International Bank* [1943] 1 Ch. 233. (C.A.)

(72) *Credit Assurance & Co.* (supra).

(73) *Dicido Pier Co.* [1891] 2 Ch. 354.

(74) *Lousiana & Co. Mortgage Co.* [1909] 2 Ch. 552; *Marwari Stores v. Gaurishankar* [1936] C. 327, 40 C.W.N. 661; *Poole v. National Bank of China* (supra).

(75) *Marwari Stores v. Gourishankar* (supra); *Caldwell v. Caldwell & Co.* [1916] W.N. 70; see also *Pinkney & Sons Steamship Co.* [1892] 3 Ch. 125 and *Lousiana & Co. Mortgage Co.* [1909] 2 Ch. 552.

(76) *Midland Ry. Carriage & Co.* [1907] W.N. 175.

(77) *Tarapaca & Tocopilla Nitrate Co.* [1917] W.N. 356, 62 S.J. 122.

(78) *Barrow v. Hæmatite Steel Co.* [1900] 2 Ch. 846, on appeal [1901] 2 Ch. 746.

(79) *Credit A. & G. Corporation* [1902] 2 Ch. 601; see also *Scottish Insec. Corpn. v. Wilson's Clyde Coal Co.* [1949] 1 A.E.R. 1068 (H.L.).

In the very recent case of *Old Silkstone Collieries* (80) it has been held that the proposed reduction of capital operated unfairly to the preference stockholders, who had agreed to the earlier reductions on the understanding that they would remain entitled to claim, in adjustment proceedings under s. 25 of the Coal Industry Nationalisation Act, 1946, the same adjustments as they could have claimed if those reductions had not been made, and, therefore, assuming that the special resolution at a meeting of only the holders of the second preference stock and ordinary stock was validly passed, the Court in the exercise of its discretion would not confirm the reduction, as it was unfair and inequitable.

**552J. Power of reduction :—**It is doubtful whether a company can contract itself out of the power to reduce its capital which is conferred upon it by the Act and the articles (81). Subject to the confirmation by the Court, which is the safeguard of the minority (81), the question of reduction of capital is one for the decision of the majority (81), and the Act leaves the company to determine the extent, the mode and the incidence of the reduction and the application of any capital moneys which the reduction may set free (82). Unauthorized reduction of capital will be restrained by the Court (82).

An unlimited company can reduce its capital in any way its memorandum and articles allow (83).

**101. Application to Court for confirming order, objections by creditors, and settlement of list of objecting creditors.—**(1) Where a company has passed a resolution for reducing share capital, it may apply, by petition, to the Court for an order confirming the reduction.

(2) Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, the following provisions shall have effect, subject to the provisions of sub-section (3) :—

(a) every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction ;

(b) the Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of

(80) [1954] 1 A.E.R. 68 (C.A.)

(81) *Barrow v. Hematite Steel Co.* [1888] 39 Ch. D. 582 at p. 596 ; *British & A. T. Finance Corp. v. Couper* [1894] A.C. 399

(82) *Holmes v. Newcastle &c. Abattoir Co.* [1875] 1 Ch. D. 682 ; *Hope v. International Financial Society* [1877] 4 Ch. D. 327 and *Bannatyne v. Direct Spanish Telegraph Co.* [1886] 34 Ch. D. 287.

(83) *Borough Commercial & Building Society* [1893] 2 Ch. 242.

their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction ;

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount :—

(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then, the full amount of the debt or claim ;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then, an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct that the provisions of sub-section (2) shall not apply as regards any class or any classes of creditors.

This section corresponds to ss 56, 58 and 59 of the previous Act and s. 67 of the English Act of 1948.

**553. What the petition should contain .** Where there is more than one class of shares, a petition for reduction of capital should state whether or not there is any priority as to capital (84). The petition must be supported by affidavits and a copy of the memorandum and articles of association, and the original minute-book of the proceedings must be made an exhibit (85).

**554. Questions to be considered :-** In an application under this section the Court is only concerned to confirm the proposed reduction and not the resolution passed by the company (86). Where besides the resolution there is no material on which the Court can make the confirmation order and the resolution is not a valid one, its value is reduced to nullity (87). The only questions to be considered by the Court are : (1) Ought the Court to refuse its sanction to the reduction out of regard

(84) *Mackenzie & Co.* [1916] 2 Ch. 450.

(85) *Omnium Investment Co.* [1895] 2 Ch. 127.

(86) *In re Hyderabad (Deccan) Co.* [1897] 75 L.T. 23 ; *Poole v. National Bank of China* [1907] A.C. 229, per Lord Macnaghten ; *Jaiton Stock Exchange Assn.* [1952] Pepsu. 114.

(87) *Jaiton Stock Exchange Assn.*, *supra*

to the interests of those members of the public who may be induced to take shares in the company? Is the reduction fair and equitable as between different classes of shareholders? Where the reduction is shared by all and is designed to work justly and equitably, and where it does not involve diminution of any liability in respect of any unpaid capital or payment to any shareholder of any paid up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction (88).

**555. Simultaneous resolution to increase capital :—**Where along with the resolution as to reduction of capital, another resolution is passed for the increase of capital by the issue of new shares and this fact is stated in the application under this section with the prayer for sanction of the new scheme of reorganization, but the same is subsequently withdrawn on the objection of some shareholders, the increase of capital does not fall to be considered by the Court under the present section, as the function of the Court does not extend to the exercise of the paternal care of the shareholders of a company, for such matter exclusively falls within the internal management of the company (88). In the last cited case the creditors of the company were not concerned at all.

**556. Condition giving jurisdiction :—**In *Poole v. National Bank of China* (89) Lord Macnaghten observed : "The condition that gives jurisdiction, is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect."

**557. Private company :—**The Court will not readily accede to the prayer of dispensing with intimation and advertisement of the petition, where the company is a private one and a family concern (90).

**558. Creditors' right to object :—**Where a reduction of capital does not involve diminution of assets and there has been no default by the company under the provisions of its debenture deed, a debenture-holder or creditor, and in particular a secured creditor, must make out a strong case before the Court will direct that he is entitled to object to the reduction, and the Court will not exercise its discretion in favour of the debenture-holders where there is no evidence that the assets are an insufficient security (91).

**559. SUB-S. (2) (b) :—**The language of sub-s. (2) of s. 58 of the previous Act was imperative. The Court could not dispense with the procedure even if there was no creditor (92).

**560. Debenture holders :—**Debenture-holders may, on receiving notice by advertisement, appear and claim to be entered on the list and are, if they fail to do so, to be excluded from the right of objecting (93). Creditors named in the list whose debts are secured, but not yet due, and who have neither assented nor dissented, must be taken to have assented (94).

**561. Consent of creditors :—**An extraordinary resolution passed by the majority at a meeting of debentures-holders is a sufficient consent of all the debenture-holders (95).

(88) *Bengal-Burma Steam Navigation Co* [1939] R. 47.

(89) [1907] A.C. 229.

(90) *G. Mackay & Co.* [1915] 52 Sc. L.R. 64.

(91) *Meux Brewery Co.* [1919] 1 Ch. 28.

(92) *Hydraulic Power & Smelting Co* [1911] 2 Ch. 187; *Lamson Store Service Co.* [1895] 2 Ch. 726.

(93) *Credit Foncier of England* [1871] 11 Eq. 356. See also *Hydraulic Power Co.* (supra).

(94) *Ibid* (*Credit Foncier*); but see *Patent Ventilating Granary Co.* [1879] 12 Ch. D. 254.

(95) See *Hydraulic Power & Smelting Co.* (supra).

**102. Order confirming reduction and powers of Court on making such order.**—(1) The Court, if satisfied with respect to every creditor of the company who under section 101 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

(2) Where the Court makes any such order, it may—

(a) if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period commencing on, or at any time after, the date of the order, as is specified in the order, add to its name as the last words thereof the words “and reduced”; and

(b) make an order requiring the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to giving proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

(3) Where a company is ordered to add to its name the words “and reduced”, those words shall, until the expiration of the period specified in the order, be deemed to be part of the name of the company.

This section corresponds to ss. 60, 57 and 65 of the previous Act and s. 68 of the English Act of 1948. See notes to ss. 100 and 101.

**562. Consent** :—Where debentures to bearers were outstanding and the names of the bearers could not be ascertained, the Court allowed unanimous resolution of a meeting of debenture-holders at which 87 per cent. of the issue was represented, to suffice as equivalent to the consent of all (96).

**563.** If the debt is admitted or proved or is an ascertained sum, the amount must be set aside, and if the company refuses to do it, sanction to the reduction may be refused (97).

**564. Court's power to confirm** :—The Court has an absolute discretion to confirm (98), or refuse (99) to confirm, the reduction, or impose such terms and conditions on the company as it thinks fit (1). The only express statutory limitation is that certain measures must be taken for the protection of the creditors. The Court cannot, except in exceptional cases, review the opinion of the company in regard to

(96) *Hydraulic Power & Smelting Co.* (supra).

(97) *Palace Billiard Rooms v. City Property Corporation* [1912] S.C. 5 (Ct. of Sess).

(98) *James Colmer Ltd.* [1891] 1 Ch. 524.

(99) *Direct Spanish Telegraph Co.* [1887] 34 Ch. D. 307; *Barrow Hæmatite Steel Co.* [1901] 2 Ch. 746.

(1) *Caldwell v. Caldwell & Co.* [1916] W.N. 70, [1916] S.C. (H.L.) 120; *Pinkney & Sons Steamship Co.* [1892] 3 Ch. 125; *Louisiana &c. Mortgage Co.* [1909] 2 Ch. 552.



its domestic or commercial questions (2). The Court has power, in a proper case, to confirm a resolution for reduction of capital notwithstanding that the voting powers may thereby be affected (3). The Court has also power to sanction a reduction of some only of the shares of a company (4). Upon the requirements of the Act being satisfied, the Court confirmed a scheme of reduction under which a portion of the capital was to be returned to the shareholders, although a part of the portion so returned was to be immediately borrowed from them by the company on debentures (5). Where the scheme of reduction, which had been agreed upon by a majority and sanctioned by each section of the shareholders (preferred, ordinary and deferred) acting by itself, was not so wrong or unfair that the Court ought to refuse its sanction, it was satisfied that the scheme would not work unfairly or inequitably to any one (6). But where the proposed reduction operated unfairly to the preference stockholders, the Court in its discretion would not confirm the reduction (7).

The Court had power to confirm the following resolution for reduction: "That in respect of each of the shares in the capital of the company upon all of which the sum of 14 l. per share had been paid up, capital be paid off or returned to the extent of 3 l. per share, so as to reduce the capital paid upon all such shares to the sum of 11 l. per share upon the footing that the amount paid off or returned on each share, or any part of it, may be called up again in the same manner as if it had never been paid." The nominal capital was not altered by the proposed reduction (8). But where a company increased its share capital and part of the new shares was issued as fully paid up on the consideration for the purchase of some property by the company and the remaining shares were issued at a discount of 15 s. per share, then the company passed a special resolution for reduction of the capital by cancelling paid up capital to the extent of 15 s. per share as being lost or unrepresented by available assets, it was *held* that the proposed reduction could not be confirmed by the Court (9).

**565. Scheme under s. 391 :—**If a scheme of arrangement under s. 391 involves reduction of capital, all the requirements of the Act with regard to reduction must be complied with; and it is necessary to advertise the petition for sanctioning the scheme, unless the Court has dispensed with any advertisement (10).

**566. Scheme involving alteration of rights :—**A scheme of reduction of capital is not necessarily unfair or inequitable because it involves an alteration of the rights of voting and priority as between the different classes of stockholders (11).

**567. Object of addition of "and reduced" :—**The addition of the words "and reduced" is required in order to give warning to the public of the financial position of the company (12). The fact that the company is carrying on business abroad will necessarily induce the Court to dispense with the use of these words (13). But in a proper case, where the use of the words "and reduced" has greatly prejudiced the company's credit by leading foreign customers to suppose that the com-

(2) Leicester Mortgage Co. [1894] W.N. 108, 38 S.J. 531.

(3) Caldwell v. Caldwell & Co., *supra*; Pinkney & Sons, Steamship Co. [1892] 3 Ch. 125; Louisiana &c. Mortgage Co. [1909] 2 Ch. 552.

(4) Gatling, Gun, Ltd. [1890] 43 Ch. D. 628.

(5) Nixon's Navigation Co. [1897] 1 Ch. 872.

(6) Samuel Alsopp & Sons, Ltd. [1908] 19 T.L.R. 637 (639).

(7) Old Silkstone Collieries Ltd. [1954] 1 A.E.R. 69 (C.A.).

(8) Fore-Street Warehouse Co. [1882] 59 L.T. 214.

(9) New Chile Gold Mining Co. [1889] 38 Ch. D. 475.

(10) White P. & Y. Ry. Co. [1918] W.N. 323, 63 S.J. 55.

(11) Welsbach I. G. Light Co. [1904] 1 Ch. 87.

(12) Pinkney & Sons Steamship Co. [1892] 3 Ch. 125.

(13) Lindner & Co. [1911] W.N. 66.

pany might be unable to meet its obligations, the Court may limit the time for use of the words to a short period, say fourteen days (14). The time usually ordered is one month (15).

Where a special resolution for reduction of capital has been abandoned before the confirmation by the Court, it will give leave to discontinue forthwith the use of the words "and reduced" as part of the company's name (16).

**568. Consequences of failure to make the addition :—**Where the company failed to add the words "and reduced" to its name after the confirmation of the resolution for reduction, the petition for confirmation by the Court was incompetent (17). In the case noted below the Court dispensed with use of the words on the common seal of the company, but otherwise ordered the words to be used for one month from the date of the order (18). If the company is desirous of not using the words at all, it should make an application to that effect at the time of presentation of the petition (19). The application must be supported by affidavit (20).

**569. Sub-s. 2 (b) :—**The Court rarely acts under this clause, but may do so where the loss has been very large and sudden (21).

### 103. Registration of order and minute of reduction.—

#### (1) The Registrar—

(a) on production to him of an order of the Court confirming the reduction of the share capital of a company; and

(b) on the delivery to him of a certified copy of the order and of a minute approved by the Court showing, with respect to the share capital of the company as altered by the order, (i) the amount of the share capital, (ii) the number of shares into which it is to be divided, (iii) the amount of each share, and (iv) the amount, if any, at the date of the registration deemed to be paid up on each share; shall register the order and minute.

(2) On the registration of the order and minute, and not before, the resolution for reducing share capital as confirmed by the order shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(14) *Sanders, Rehders & Co.* [1919] W.N. 103. For cases where the words were allowed to be dispensed with see *Scottish Power Co.* [1917] S.C. 123 and *Australian Estates Co.* [1910] 1 Ch. 414 and *Sumatra T. Plantations Co.* [1898] W.N. 80.

(15) *Ocean Queen Steamship Co.* [1893] 2 Ch. 666; *Monmouthshire Steel Co.* [1906] W.N. 120.

(16) *Mordey, Carnes & Co.* [1885] 53 L.T. 736.

(17) *John T. Clarke & Co.* [1911] S.C. 243.

(18) *Andrew Knowles & Sons* [1912] W.N. 300; see also *Hoare & Co.* [1910] W.N. 87.

(19) *Pelsall Coal Co.* [1890] W.N. 222.

(20) *Maxim Western Electric Co.* [1888] W.N. 211, 59 L.T. 722

(21) *Truman, Hanbury, Buxton & Co.* [1910] 2 Ch. 498.

(4) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

(5) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein.

(6) The substitution of any such minute as aforesaid for part of the memorandum of the company shall be deemed to be an alteration of the memorandum within the meaning and for the purposes of section 40.

This section corresponds to ss. 61 and 62 of the previous Act and s. 69 of the English Act of 1948. See notes to s. 100.

**570. Form and contents of the minute for reduction :—**The minutes for reduction of capital must contain, among other particulars, the denoting numbers of the shares referred to therein; the notice of registration of such minutes need not however contain the denoting numbers, but may be in such shortened form as the Court may direct (22). The minutes must contain the denoting numbers of the shares where they are not all paid up to the same extent (23). This will not be excused; but if the minutes are very complicated, a shortened form of advertisement may be allowed (22). For what the minutes and memoranda should contain see case notes (22) and (24).

For the form of the minute where the scheme for reduction involves a reorganisation of capital, see cases noted below (25).

The form of minute to be registered pursuant to this section should contain a statement of sub-division of the share capital as effected by the resolution for reduction, but need not contain the original numbers of the shares, nor the fact that nothing has been paid up on the unissued shares (25).

**571. Registrar's certificate conclusive :—**The Registrar's certificate is conclusive evidence that the requirements of the Act have been complied with (26), though it appears afterwards that the company had no power under the articles to reduce its capital or that the special resolution for reduction was invalid (27).

## **104. Liability of members in respect of reduced shares.—**(1) A member of the company, past or present, shall not be liable, in respect of any share, to any call or contri-

(22) *Oceana Development Co.* [1912] W.N. 121, 138; 56 S.J. 537.

(23) *Solway Steamship Co.* [1894] 61 L.T. 659.

(24) *Thomas Wolfe & Sons* [1912] W.N. 286.

(25) *Salinas of Mexico* [1919] W.N. 311; but see *North Pole Ice Co.* [1924] W.N. 131; *J. Dampney & Co.* [1924] W.N. 200; *Anglo-French Exploration Co.* [1902] 2 Ch. 845, 858.

(26) *Walker & Smith Ltd.* [1903] W.N. 82, 88 L.T. 792; in this case the certificate was held conclusive although there was no power under the articles to reduce the capital.

(27) *Ladies' Dress Association v. Pulbrook* [1900] 2 Q.B. 376.

bution exceeding in amount the difference, if any, between the amount paid on the share, or the reduced amount, if any, which is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the minute of reduction :

Provided that, if any creditor entitled in respect of any debt or claim to object to the reduction of share capital is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after the reduction the company is unable, within the meaning of section 434, to pay the amount of his debt or claim, then—

(a) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day immediately before the said date ; and

(b) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

This section corresponds to s. 63 of the previous Act and s. 70 of the English Act of 1948. It was originally cl. 97 of the Bill which was a reproduction of s. 63 of the previous Act. The Joint Committee have restored the original wording of that section (*vide* J.C.R., para 49).

**105. Penalty for concealing name of creditor, etc.—**  
If any officer of the company—

(a) knowingly conceals the name of any creditor entitled to object to the reduction ;

(b) knowingly misrepresents the nature or amount of the debt or claim of any creditor ; or

(c) abets or is privy to any such concealment or misrepresentation as aforesaid ;

he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both

This section corresponds to s. 64 of the previous Act and s. 71 of the English Act of 1948. The word "knowingly" has been substituted for "wilfully" in clauses (a) and (b)—*Notes on Clauses*

### *Variation of Shareholders' Rights*

**106. Alteration of rights of holders of special classes of shares.—**(1) In the case of a company the share capital of which is divided into different classes of shares, provision may be made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to—

(a) the consent of the holders of any specified proportion, not being less than three-fourths, of the issued shares of that class, or

(b) the sanction of a resolution passed at a separate meeting of the holders of those shares, and supported by the votes of the holders of any specified proportion, not being less than three-fourths, of those shares.

(2) Any provision in the memorandum or articles of a company in force immediately before the commencement of this Act which specifies for the purpose aforesaid any proportion which is less than three-fourths of the shareholders of the class concerned shall, after such commencement, have effect as if a proportion of three-fourths had been specified therein instead.

SS. 105 and 106 (now ss. 106 and 107) are based on s. 66A of the previous Act and s. 72 of the English Act of 1948. Reg. 4 of Table A of the old Act has been embodied in this section. The time limit laid down in sub-s. 2 of s. 66A of the old Act has been extended to 21 days. See sub-s. (2) of s. 107. These changes are based on the recommendations of the Company Law Committee—*Notes on Clauses*.

**571A. Quorum :—**Although Art. 52 of a company's articles of association required that a quorum should be present when the meeting proceeded to business, it was not necessary that the quorum should also be present when the vote was taken, particularly as the construction of the article was the only one which could prevent there being a gap in the scheme of Arts. 52 or 53 of the company's articles. Accordingly it was held that the resolution was validly passed (28).

For other cases, see notes to the next section.

**107. Rights of dissentient shareholders.—**(1) If, in pursuance of any provision such as is referred to in section 106, the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who

did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application, the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation ; and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall, within fifteen days after the service on the company of any order made on any such application, forward a copy of the order to the Registrar ; and if default is made in complying with this provision, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

This was originally cl 100 of the Bill. The Joint Committee has increased the period of 14 days to 21 days in this section in accordance with the recommendation of the Company Law Committee (*vide* J.C.R., para 50).

See notes to s. 106.

**572. Sub-s. (1) :** Where the proposed increase of capital by the creation of some new cumulative preference shares ranking *pari passu* with the existing preference stock and some ordinary shares ranking *pari passu* with the existing ordinary stock would or might affect the enjoyment of their rights by the preference stockholders, but their rights would not be affected, the proposed transaction could be carried out without the summoning of a separate meeting of the preference stockholders as provided for by Art. 68 and without the summoning of preference stockholders to attend and vote at a general meeting in accordance with Art. 83. (29).

Art. 54 of a company's articles of association provided: "Subject to the provisions of s. 61 of the Act of 1929 (replaced by s. 72 of the Act of 1948) all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate

meeting of the members of that class". By Art. 69 it was provided: "... on a show of hands every member personally present shall have one vote only and in case of a poll every member shall . . . have one vote for every share held by him. . . ." The directors of the company of which the issued paid up capital consisted of £1,740,000 five per cent. cumulative preference stock and £1,920,000 ordinary shares of £1 each, proposed to increase the capital by the creation of 280,000 ordinary shares of £1 each, to capitalise an amount standing to credit of the company's reserve account, and to apply the same in paying up the new ordinary shares which would then be distributed among these creditors as fully paid up. Held that notwithstanding that the position of the ordinary shareholders would be thereby strengthened as compared with the preference stock-holders, the proposed transaction did not affect the rights of the latter within the meaning of Art. 54. (30).

573. The presence, at a separate meeting of the holders of one class of shares, of holders of a different class not voting either by show of hands or on a poll, does not invalidate the meeting as a separate class meeting, or the poll taken thereat (31).

574 Under the corresponding section (s. 61) of the English Act of 1929 (s. 72 of the Act of 1948) it has been held that an application to cancel a variation of shareholders' rights must be made out only within 7 days after the consent to or resolution for such variation was given or passed, but also either by the actual holder or holders at the date of the presentation of the petition of 15 per cent. of these shares, and that appointment cannot be validly given or completed after the presentation of a petition by a shareholder not then qualified to present it (32), that is to say, when an application is being made under this section, it must show on the face of it the title of the appointment, and unless he himself holds 15 per cent. of the shares or stock in question, the application must show that he has been appointed by the necessary percentage of the dissenting members (32).

To clothe a petitioner with the necessary authority to make an application on behalf of other shareholders under this section to have a variation of the rights attached to any class of shares cancelled, not only must the appointment of the petitioner be *in writing* but the fact that such authority has been signed must also have been communicated to the petitioner at the time when the petition is presented and not merely before it comes on for hearing (33).

As to the rights of the minority of shareholders generally see notes to s. 3, sub-s. (1) (i) "company".

575. **Adjourned meeting** :—If a class meeting stands adjourned for want of quorum, the full quorum will be required at the adjourned meeting (34).

576. Where it was contended (35) on behalf of G that the resolution for sub-division of shares was void because (i) it varied the rights attached to the (1941) 2 s. ordinary shares under Art. 3 of Table A of the English Act of 1929; and (ii) it amounted to a breach of the contract under which G had advanced £11,000; on behalf of the defendants it was contended that although the rights of the holders of the (1941) 2s. shares had been affected by the sub-division they had not been varied thereby: *Held*, (i) although the 10s. ordinary shares of the (1941) 2s. ordinary shares might be one class of shares for some purposes, they were two distinct classes of shares as regards voting and similar rights

(30) *John Smith's Tadcaster Brewery Co.* [1953] 1 A.E.R. 518 (C.A.).

(31) *Carruth v. Imperial Chemical Industries* [1936] 1 Ch. 578, (C.A.), affirmed in the House of Lords in [1937] A.C. 707.

(32) *Suburban Provincial Stores, Ltd.* [1943] 1 Ch. 156 (C.A.), [1943] 1 A.E.R. 342, (C.A.).

(33) *In re Sound City Films, Ltd.* [1947] 1 Ch. 160, 176 L.T. 28.

(34) *Hemans v. Horchkiss Ordnance Co.* [1899] 1 Ch. 115.

(35) [1892] 2 Q.B. 573.

[*Sovereign Life Assurance Co. v. Dodd* (35) and *United Prov. Assurance Co.* (36) applied]; the sub-division of shares although materially affecting the rights attached to the (1941) 2s. ordinary shares did not vary them, rights of one class of shares were not "varied" by operation effected upon other classes of shares; the sub-division of the remaining 10s. ordinary shares was not therefore vitiated by these provisions; (ii) since there was no express term in the agreements which had been infringed, the sub-division did not amount to a breach of contract (37).

### *Transfer of shares and debentures*

The original clause 101 of the Bill providing for interpretation of shares has been omitted by the Joint Committee with the following remark: "The Committee have omitted this clause, and made appropriate changes in clause 108" (now s. 109). (*Vide* J.C.R., para 51).

**108. Transfer not to be registered except on production of instrument of transfer.**—(1) A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures :

Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit :

Provided further that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.

(2) In the case of a company having no share capital, sub-section (1) shall apply as if the references therein to shares were references instead to the interest of the member in the company.

This section corresponds to sub-s. (3) of s. 34 of the previous Act and s. 75 of the English Act of 1948. The first Proviso is based on the Proviso to s. 34 (3) of the

(36) [1910] 2 Ch. 477.

(37) *Greenhalge v. Aldern Cinemas, Ltd.* [1945] 2 All E.R. 710; confirmed on appeal in [1946] 1 A.E.R. 512 (C.A.).



old Act and the second Proviso on the Proviso to s. 75 of the English Act—*Notes on Clauses*.

**576A. Scope. Section not applicable to Court sales :—**Under s. 28 of the previous Act (now s. 82) articles of association requiring that a transferee can obtain mutation only on the basis of an instrument of transfer signed by the transferor and the transferee is confined to private transfers of shares, and does not apply to Court sales (38). The language of s. 34 (3) of the previous Act (now sub-s. (1) of the present section) clearly showed that it applied only to transfers by act of parties and not to sales held by the Court (38).

*Information to Registrar:—*There is no obligation upon the management of a company to inform the Registrar forthwith that certain shares have been transferred from the name of one shareholder to another (39).

**577. Transfer and transmission—distinction. Court sale :—**Transfer is by a voluntary act of parties whereas transmission is by operation of law. A court-sale is not a transfer. An article which gives the directors absolute and unrestricted discretion to refuse to register a proposed transfer of shares has no application to a court-sale, and the directors cannot refuse to register a transfer of shares effected by a court-sale (40).

**578. Second Proviso. Transfer by operation of law :—**Where there was nothing in the articles forbidding a sale by Court of the shares, such a sale has the effect of transferring the shares to the purchaser. The language of sub-s. (3) of s. 34 of the old Act requiring a proper instrument of transfer clearly showed that it applied only to transfers by act of parties and did not apply to sales held by the Court (41).

Until a transfer is registered, the transferor continues to be the legal owner of the shares, and after his death the same right is owned by his heirs. Hence where after filing an application for a duplicate share certificate the member who has subsequently transferred his shares dies, the company could demand letters of administration from the heirs under its articles of association (42).

**579. Right to transfer :—**As to the right of a shareholder to transfer his shares, see notes to s. 82. Where the original purchaser of shares had not been registered in respect of them, he was not by that omission precluded from transferring the shares (43). But if a company purchases its own shares, no matter where, a member who has sold the shares to the company cannot be removed from the register, because the purchase must be deemed to have been not validly made, as it is *ultra vires* of the company. The effect of a company purchasing its own shares is that the vendor in point of law does not cease to be the legal owner of the shares, even if the purchase was made outside the State where the company was incorporated, and the liability of the vendor as a contributory in respect of such shares continues (44).

**580. Transferor becomes trustee for transferee before registration :—**On the transfer of shares the transferee becomes the sole beneficiary owner thereof but the legal title remains vested in the transferor until registration is effected. Thus the relation of trustee and *cestui que trust* is thereby established between them. The

(38) *Mahadeo v. New Darjeeling U. Tea Co.* [1951] 55 C.W.N. 408. But see notes to s. 82 *ante*.

(39) *State v. Balaram* [1955] N.U.C. 5328 (Bom.).

(40) *Wahid Bus & Mailis Transport Co.* [1919] L. 6—Per Teja Singh J.

(41) *Mahadeo v. New Darjeeling Union Tea Co.* [1952] C. 58; *Lakshmi Narasa v. Official Receiver* [1951] 1 M.L.J. 488.

(42) *Amraoti Electric Supply Co. v. R. S. Chandok* [1954] N. 293.

(43) *Morris v. Cannan* [1862] 4 De G. F. & J. 581.

transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy the demands of s. 94, Trusts Act, 1882, and the transferor must comply with all reasonable directions that the transferee may give including those for voting (45). This principle of equity cannot however be extended to cases where the transferee has not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime certain other privileges and opportunities arise for purchase of new shares in consequence of the ownership of the shares already acquired (46). The principle of justice requires that the *cestui que trust* who gets all the benefits of the property should bear its burden, unless he can show some good reason why his trustee should bear them himself (46). The circumstance that the transferee must, to perfect his legal title, apply for and obtain registration does not prevent the transfer from so operating, and pending registration the transferor is the trustee of the transferee (47).

**581. Protection of transferor** :—If the transferee does not apply to have the transfer registered, the transferor can, or he can make an application to the Court for rectification of the register of members (48). This section is intended for the protection of the transferor if the transferee fail to perform his duty of getting the transfer registered (49). But it is the duty of the transferor to see that all formalities necessary to complete the transfer are performed. If however the directors fail in their duty to see them performed, they cannot after a lapse of time hold the transferor liable (50).

**582. Forfeiture for non-payment of call** :—Where a call for payment of unpaid share money is made on the transferee of shares, before his name has been entered as a member, under sub-s. (2) of s. 36, the call would be invalid and hence the forfeiture of the shares for non-payment of the call money would also be invalid (51).

**582A. Sub-s. (1)** :—This corresponds to sub-s (1) of s. 34 of the previous Act. Mere knowledge of the transfer on the part of the company's officers is not enough to satisfy the requirements of this sub-section (52).

**583- Instrument of transfer** :—An article conferring upon the directors power to transfer shares in spite of the absence of an instrument of transfer is *ultra vires* of this section (53).

Where the articles of a private company were altered thus: That upon the death of any of the directors his share or shares shall, notwithstanding any provision or direction made by him in his life time as to the disposition thereof upon his death to the contrary, be deemed to have passed upon his death to his wife, and such wife shall be the only person recognised by the company as having any title to the share or shares, it was *held* that the alteration of the articles was in contravention of s. 63 of the English Act of 1929 (corresponding to the present section) as there was no instrument of transfer delivered to the company, nor has the right to the shares been transmitted to the widow by operation of law. The registration of the widow's

(44) *Sabarathnam v. O. L. Travancore N. & Q. Bank*, *infra*.

(45) *Mathalane v. Bombay Life Assurance Co.* [1953] S. C. 308. See also *E. D. Sassoon & Co. v. Patch* [1943] 15 Bom. L. R. 46; *Re Butt* [1952] 1 A.F.R. 167 (C.A.).

(46) *Mathalane v. Bombay Life Assurance Co.* [1953] S. C. 308.

(47) *Re Rose* [1952] 1 A.F.R. 1217 (C.A.).

(48) *Stranton Iron & Steel Co.* [1873] 16 Eq. 559.

(49) *Skinner v. City of London Corpn.* [1885] 14 Q.B.D. 882.

(50) *Murray v. Bush* [1873] L.R. 6 H.L. 37.

(51) *Panna Lal v. Jagatjit* [1952] Pepsu 47.

(52) *Suryanarayana v. Bank of Hindusthan* [1955] N. U. C. 1004 (Mad.).

(53) *Madhava v. Canara Banking Corpn.* [1941] M. 354. [1940] 2 M.L.J. 937. [1941] M.W.N. 28.

name was wrong and the register was ordered to be rectified by registering the shares in the joint names of the personal representatives of the deceased (54).

Sub-s. (3) of s. 34 of the old Act contemplated that before the company could lawfully register a transfer the following conditions should have been fulfilled, namely:—(i) the instrument of transfer was duly stamped; (ii) the instrument was executed both by the transferor and the transferee; and (iii) the instrument was delivered to the company along with the scrip (55).

**583A. "Duly stamped" :—**It is immaterial that the company does not demand a proper stamp; nor does the fact that the instrument could be validated under the Proviso (a) of s. 35 of the Stamp Act, 1899 make it enforceable until the stamp duty and penalty are paid; and s. 36 of that Act has no application as the proceedings before the company are not of a judicial character (55).

Where the company in the exercise of its absolute discretion under its articles refuses the transfer on the ground that a duly executed and stamped instrument is not produced before it, the Court will not entertain an application under s. 155 *post* for rectification of the register of members, as the company cannot be compelled to do something which it is not lawful for it to do (56). The remedy of the transferee is not limited to an application under s. 155, but he has the right to bring a suit to get his name registered, and where the case is a complicated one, an action should be brought (57).

Before a shareholder claims that his name should be entered on the register of the company, he has to submit the share certificate and a properly executed and duly stamped transfer form. Where therefore an instrument of transfer properly stamped has not been given, it cannot be said that the transferee's name was omitted without any sufficient cause (58).

The W. Company upon the reduction of its capital, which was sanctioned by the Court, transferred to one of its shareholders 134 shares which it held in the L. Company, the consideration for the transfer being 10 s., although the market value of the 134 shares was 149l. S. 74 (b) of the English Finance Act, 1910 provides that a transfer made for nominal consideration by a person in a fiduciary capacity shall not be charged duty under the section. On behalf of the company it was contended that it was acting in pursuance of an order of the Court and therefore acted in a fiduciary capacity and that the consideration was not inadequate for it consisted not merely of 10 s., but also of the suffering by the transferee of the reduction of the capital which materially affected him. *Held* (1) that the company had not acted in a fiduciary capacity; (2) that the reduction of capital, even if it formed part of the same transaction, could not be considered as a consideration moving from the transferee to the company and (3) that *ad valorem* stamp duty was payable on the value of the 134 shares (59).

**By whom payable:—**If a company registers an instrument of transfer which is not duly stamped, it would be doing something which is unlawful but there is no provision either in the Companies Act or in the Stamp Act which makes the company liable for the stamp duty. The liability rests upon the executant of the instrument of transfer. If the document is brought before the revenue authorities they can impound it and realise the duty from the executant (60).

(54) *Re Greene: Greene v. Greene* [1949] 1 A.E.R. 167.

(55) *Amraoti Electric Supply Co. v. R. S. Chandok* [1954] N. 293.

(56) *Dhampur Sugar Mills* [1955] N. U. C. 1997 (All.).

(57) *Mahadeo v. New Darjeeling U. Tea Co.* [1951] 55 C.W.N. 408 following I.L.R. 47 Cal. 901.

(58) *New Citizen Bank of India v. Asian Insurance Co.* [1945] B. 149, 46 Bom. L.R. 782, [1945] Bom. 334.

(59) *Wigan Coal & Iron Co. v. Inland Revenue Comrs.* [1945] 173 L.T. 79.

(60) *Jagdish Mills* [1955] N.U.C. 79 (S.B.) (Bom.), 56 Bom. L.R. 525.

**583B. Blank transfer :—**Where shares are purchased in open market with blank transfer forms duly executed by the registered shareholder, the ultimate purchaser filling up his name in the form is entitled to have his name entered in the share register (61).

**584. Onus :—**Where the directors refuse an application for transfer of shares, the presumption would be that the directors acted *bona fide* and the *onus* would be on the person challenging their action to establish the lack of *bona fides* and the impropriety on their part (62).

**585. Directors' refusal to register transfer :—**The directors can in a proper case refuse to register a transfer, but they cannot sit over the matter indefinitely (63). Where the directors in refusing to register a transfer of shares reasonably and *bona fide* exercise their powers under the relevant articles, the refusal is valid (64). Where the directors refuse to consent to a transfer of shares, they are not ordinarily bound to state their reasons, and even if they do not state their reasons, no presumption of bad faith can be drawn. In order to vitiate the exercise of their powers and to justify the inference by the Court, it must be distinctly made out that the directors have been acting from some improper motive, or arbitrarily and capriciously (65). See notes to s. 82 and Reg. 19 in Table A.

The Court will not control the exercise of a discretion given by the articles to its directors as to registering transfers, unless it is proved that they are not exercising it *bona fide*. The presumption would be that they had acted *bona fide* and the *onus* would be on the person challenging their action to establish the lack of *bona fides* and the impropriety on their part (66).

The discretion to refuse to register a proposed transfer should be exercised at the earliest opportunity. When the directors have once accepted the transfer and agreed to register it and have communicated their acceptance, they have no power to change their decision later on (67).

Only a person who is on the register is in full sense of the word the owner of the shares. Before a shareholder on the register can get himself removed and other person can come in his stead, both must conform to the regulations of the company (68).

Where the application for registering a transfer is returned within one month of its presentation, this is tantamount to an intimation of refusal to register the transfer (69). Moreover under sub-s. (5) of s. 34 of the old Act a breach of sub-s. (4) thereof entailed a penalty and did not entitle the transferee to an automatic rectification of the register (69).

As to transfer of shares generally, see notes to s. 82 and reg. 19, Table A.

As to the liability of a past member in the winding up, see s. 426.

## 109. Transfer by legal representative.—A transfer of the share or other interest in a company of a deceased member

(61) Mahaluxmi Cotton Mills, *infra*.

(62) Coimbatore Kamala Mills v. Sundaram [1950] M. 725, [1950] 1 M.L.J. 808, [1950] M.W.N. 406, 63 M.L.W. 579.

(63) Mahaluxmi Cotton Mills [1955] N.U.C. 399 (Cal.), 57 C.W.N. 102.

(64) Berry v. Tottenham &c. Athletic Co. [1936] 53 T.L.R. 100.

(65) Mathern Steam Tramway Co. [1927] 33 Bom. L.R. 184. See also Muthappa v. Salem Rajendra Mills, *infra*.

(66) Coimbatore Kamala Mills v. Sundaram, *supra*. See also Muthappa v. Salem Rajendra Mills [1955] M. 665, 68 M.L.W. 624.

(67) Wahid Bus & Mailis Transport Co. (*supra*).

(68) Sabarathnam v. O. L. Travancore N. & Q. Bank [1943] M. 111, 55 M.L.W. 653.

(69) Amraoti Electric Supply Co. v. R. S. Chandok [1954] N. 293.

thereof made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

This section corresponds to s. 35 of the previous Act, and s. 76 of the English Act of 1948. See also s. 34 (6) of the old Act—*Notes on Clauses*.

This was originally cl. 103 of the Bill. The Joint Committee have made some change in it with the following remark: "This clause is based on section 35 of the Indian Companies Act, 1913 with the omission of the words 'other interest'. The Committee have restored these words" (*vide* J. C. R., para 52).

**586. Transfer and transmission—distinction** :—Transfer and transmission of shares in a company are quite distinct from each other. The former is based upon the act of parties, while the latter is the result of the operation of law. In the case of a transmission of shares, they continue to be subject to the original liabilities, and if there was any lien on the shares for any sums due, the lien would subsist notwithstanding the devolution of the shares (70).

**587. "Legal representative"** :—The term "legal representative" is borrowed from the English law. "Now in English law," observed Brett, J., "though it may be regarded as settled that the primary meaning of 'legal representative' is 'executor or administrator', that meaning may be controlled by the context. Thus in certain cases it has been held to mean 'next of kin'" (71). See Note 299, *ante* for fuller notes.

**588. Rights of executors and legal representatives** :—A deceased member remains a member so long as his name remains on the register without notice to the company of his death (72). The executor or administrator of a deceased member does not become a member, unless he consents to be treated as such and to be entered on the register of members (73). The executor however can insist on being as a member in his own right, without any reference to his representative capacity, unless the articles of association contain some authority to the contrary (74). The company must enter the names of the executors on the register in the order desired by the latter (74).

Where the plaintiff on the basis of his deceased father's will called upon a bank to transfer the shares standing in his father's name to his name, but the bank arbitrarily refused to do so, it was held that the plaintiff was not entitled to give any evidence of special contract for the sale of the shares and to claim damages on its basis. But it is open to him to ask for general damages on the basis of a fall in the market of prices of the shares between the date of the final refusal of the bank and the date of the suit (75).

The legal representatives of a deceased or bankrupt member are entitled to receive on behalf of the estate any dividends, bonuses or benefits attaching to the shares and are liable to be put on the list of contributories in their representative capacity (76); but they are not members unless they have become so by formal

(70) *Thenappa v. Indian Overseas Bank* [1943] M. 743, [1943] 2 M.L.J. 201.

(71) *Dinamani v. Flahdut* [1904] 8 C.W.N. 843 at p. 851.

(72) *Per Davey L. J.* in *New Zealand & Co. v. Peacock* [1894] 1 Q.B. 622.

(73) *Bowling & Welby's Contract* [1895] 1 Ch. 663 at p. 670.

(74) *T. H. Saunders & Co.* [1908] 1 Ch. 415.

(75) *Thenappa v. Indian Overseas Bank*, *supra*.

(76) *Vide* ss. 430 and 431.

registration (77). Until they do this, they are not entitled to receive notices from the company (78).

The legal representatives of a deceased member can transfer the shares before getting themselves registered as members (79). Before registration they are liable for calls only in their representative capacity, but after registration they become personally liable (80). A company cannot reject the executor's claim to the shares relying upon its articles which enable it to refuse transfers (81). Articles forbidding executors to exercise the rights of a member until they have been registered have been held to refer to the exercise of rights on their own behalf and not on behalf of the testator's estate (82). As regards the executor's right to transfer the shares of the testator, reg. 26 of Table A gives the directors the same right to decline or suspend registration as they would have had in the case of a transfer by the deceased member before his death. But to exercise this right there must be a valid resolution of the board (83). See notes to reg. 26, Table A.

On the death of a holder of partly paid shares, the company cannot intervene to prevent distribution of the estate, unless a call has actually been made (84).

**589. Lunatic's shares** :—Shares or stock registered in the name of a lunatic can only be transferred, under an order made in lunacy, by the person named in the order (85). A trustee in bankruptcy may disclaim the bankrupt's interest in unsaleable or not readily saleable encumbered shares (86).

**590. Notice in case of death of a member** :—A notice served at the registered address of a deceased member is valid, if the company has no notice of his death (87). If the company is aware of the death, the notice should be served on the legal representative. It will be valid if the notice comes to the knowledge of the executors (88). Probate is not notice to the company of the contents of the will of the deceased member (89).

**591. Rights of the estate of deceased member to new shares** :—If the articles require that upon creation of new shares they should first be offered to the members, the estate of a deceased member must have the benefit (90). The executor, though he has not registered himself as a member, can give notice in case of a reconstruction under s. 494 and has the same right to dissent from a reconstruction scheme (91).

**592. "Personal representative"** :—The expression "personal representative" which had been used in s. 76 of the English Act means the duly constituted representative according to the law of the country in which the company is registered

(77) *James v. Buena Ventura & Co. Syndicate* [1896] 1 Ch. 456.

(78) *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656.

(79) *Simpson v. Molson's Bank* [1895] A.C. 270.

(80) *Duff's Executor's case* [1886] 32 Ch. D. 301 (C.A.); *Buchan's case* [1879] 1 App. Cas. 547, 549; *James v. Buena Ventura & Co. Syndicate* (supra).

(81) *Bentham Mills Spinning Co.* [1879] 11 Ch. D. 900.

(82) *Llewellyn v. Kasinote Rubber Estates* [1914] 2 Ch. 670.

(83) *Hackney Pavilion* [1924] 1 Ch. 276.

(84) *Re King, Mellor v. South Australian Land & Co.* [1907] 1 Ch. 72.

(85) *New York Security Trust Co. v. Keyser* [1901] 1 Ch. 666.

(86) *Wise v. Landsdell* [1921] 1 Ch. 320.

(87) *New Zealand Gold Co. v. Peacock* (supra); *Tricumdas Mills Co. v. Haji Saboo* [1902] 4 Bom. L.R. 215.

(88) *James v. Buena Ventura & Co. Syndicate* (supra) at p. 467; *Allen v. Gold Reefs* (supra) at p. 670.

(89) *Grundy v. Briggs* [1910] 1 Ch. 444.

(90) *James v. Buena Ventura & Co. Syndicate* (supra); *Allen v. Gold Reefs* (supra). Now see s. 81.

(91) See *Llewellyn v. Kasinote Rubber Estates* (supra).

(92). A transfer executed by one of two executors, not registered as holders of the shares, may be a valid transfer (93) ; but where the names of the executors are placed on the register, they become joint shareholders in their individual capacity, although they may be described as executors in the register, and consequently the shares can only be transferred by means of transfer executed by all of them (93).

See notes to regs. 25 and 26 of Table A and to s. 430.

**110. Application for transfer.—**(1) An application for the registration of a transfer of the shares or other interest of a member in a company may be made either by the transferor or by the transferee.

(2) Where the application is made by the transferor and relates to partly paid shares, the transfer shall not be registered, unless the company gives notice of the application to the transferee and the transferee makes no objection to the transfer within two weeks from the receipt of the notice.

(3) For the purposes of sub-section (2), notice to the transferee shall be deemed to have been duly given if it is despatched by prepaid registered post to the transferee at the address given in the instrument of transfer, and shall be deemed to have been duly delivered at the time at which it would have been delivered in the ordinary course of post.

This section corresponds to sub-ss. (1) and (2) of s. 34 of the previous Act—*Notes on Clauses*. The Joint Committee have made some verbal changes in this section. See notes to s. 108.

**111. Power to refuse registration and appeal against refusal.—**(1) Nothing in sections 108, 109 and 110 shall prejudice any power of the company under its articles to refuse to register the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company.

(2) If, in pursuance of any such power, a company refuses to register any such transfer or transmission of right, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such transmission, as the case may be.

If default is made in complying with this sub-section, the company, and every officer of the company who is in

(92) *New York Breweries v. A. G.* [1899] A.C. 62, 70, 71.

(93) *Barton v. North Staff. Ry. Co.* [1888] 38 Ch. D. 438.

default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

(3) The transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may, where the company is a public company or a private company which is a subsidiary of a public company, appeal to the Central Government against any refusal of the company to register the transfer or transmission, or against any failure on its part, within the period referred to in sub-section (2), either to register the transfer or transmission or to send notice of its refusal to register the same.

(4) An appeal to the Central Government under sub-section (3) shall be made—

(a) in case the appeal is against the refusal to register a transfer or transmission, within two months of the receipt by him of the notice of refusal; and

(b) in case the appeal is against the failure referred to in sub-section (3), within two months from the expiry of the period referred to in sub-section (2).

(5) The Central Government shall, after causing reasonable notice to be given to the company and also to, the transferor and the transferee or, as the case may require, to the person giving intimation of the transmission by operation of law and the previous owner, if any, and giving them a reasonable opportunity to make their representations, if any, in writing, by order, direct either that the transfer or transmission shall be registered by the company or that it need not be registered by it; and in the former case, the company shall give effect to the decision forthwith.

(6) The Central Government may, in its order aforesaid, give such incidental and consequential directions as to the payment of costs or otherwise as it thinks fit.

(7) All proceedings in appeals under sub-section (3) or in relation thereto shall be confidential, and no suit, prosecution or other legal proceeding shall lie in respect of any allegation made in such proceedings, whether orally or otherwise.

(8) In the case of a private company which is not a subsidiary of a public company, where the right to any shares or interest of a member in, or debentures of, the company, is transmitted by a sale thereof held by a Court or other



public authority, the provisions of sub-sections (3) to (7) shall apply as if the company were a public company :

Provided that the Central Government may, in lieu of an order under sub-section (5), pass an order directing the company to register the transmission of the right unless any member or members of the company specified in the order acquire the right aforesaid within such time as may be allowed for the purpose by the order, on payment to the purchaser of the price paid by him therefor or such other sum as the Central Government may determine to be a reasonable compensation for the right in all the circumstances of the case.

This section is based on sub-ss. (4) and (5) of s. 34 of the previous Act and s. 78 of the English Act of 1948. It gives a right of appeal against refusal to recognize transfers, on the lines suggested in paras 42 and 43 of the C. I. C. R. See also the summary at pages 238 and 239 of the Report. It has been made clear that there will be no right of appeal against refusal to recognize the transfer of shares of a private company which is not a subsidiary of a public company [sub-s. (3)]. Sub-s. (7) provides for appeals being heard *in camera*—*Notes on Clauses*.

This was originally cl. 105 of the Bill, which has been altered by the Joint Committee with the following observation : "The Committee consider that not only the specific refusal of a Company to register a transfer of shares, but also its failure to do so within two months of lodging of the instrument of transfer, should be made appealable to the Central Government. The Committee have omitted sub-clause (4) so that appeals will be decided by the Central Government to whom they are presented, and not by some other authority designated by the Central Government. Consequential amendments have been made in sub clauses (5) to (7) (*vide* J.C.R., para 53).

Sub-ss. (1), (2) and (3) of this section have been altered by the Lok Sabha to include therein *transmission* of shares. The Lok Sabha has similarly altered sub-s. (5) and added sub-s. (8). The effect of these alterations is that in the case of a private company which is not a subsidiary of a public company the exemptions granted under sub-ss.\* (3) to (7) are withdrawn where the right to any shares or interest of a member in or debentures of, the company is transmitted by sale by a Court or other public authority. In such cases the provision regarding appeal contained in sub ss. (3) to (7) will apply.

See notes to s. 108.

**592 (1). Directors' power under articles to refuse registration :—**Where the articles of a private company confer on the directors an absolute and uncontrolled discretion to refuse registration of transfer of a share, whether fully paid up or not, and in the opinion of the directors it is not to the interest of the company to admit the proposed transferee to membership or (if he is already a member) to allow him to increase his holding, and the directors in the exercise of that discretion refuse to register the transfer of a share, then unless it can be shown that the power was exercised *mala fide* or for any collateral purpose, the Court cannot overrule the decision of the directors and substitute its own judgment about the advisability of bringing the name of the person as a shareholder in the register (94). In *Smith & Fawcett Ltd.* (94) Lord Greene, M. R. observed : "Private companies are, of

(94) *Balwant Transport Co. v. Despande* [1956] N. 20 relying on *Smith & Fawcett Ltd.* [1942] 1 A.E.R. 542.

course, separate entities in law, just as much as are public companies, but from the business and personal point of view, they are much more analogous to partnerships than to public corporations."

Where the company had adopted regulations 18 to 23 of Table A of the previous Act subject to the modification of reg. 20 thereof, then even in a case falling under reg. 22 (of the previous Act) the directors had the same right to decline or suspend registration as they would have had in the case of a transfer of a share by the deceased or insolvent person before the death or insolvency (94).

**112. Certification of transfer.**—(1) The certification by a company of any instrument of transfer of shares in, or debentures of, the company, shall be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show a *prima facie* title to the shares or debentures in the transferor named in the instrument of transfer, but not as a representation that the transferor has any title to the shares or debentures.

(2) Where any person acts on the faith of an erroneous certification made by a company negligently, the company shall be under the same liability to him as if the certification had been made fraudulently.

(3) For the purposes of this section—

(a) an instrument of transfer shall be deemed to be certificated if it bears the words "certificate lodged" or words to the like effect ;

(b) the certification of an instrument of transfer shall be deemed to be made by a company, if—

(i) the person issuing the certificated instrument is a person authorised to issue such instruments of transfer on the company's behalf ; and

(ii) the certification is signed by any officer or servant of the company or any other person, authorised to certificate transfers on the company's behalf, or if a body corporate has been so authorised, by any officer or servant of that body corporate ;

(c) a certification shall be deemed to be signed by any person, if it purports to be authenticated by his signature unless it is shown that the signature was placed there neither by himself nor by any person authorised to use the signature for the purpose of certificating transfers on the company's behalf.

This section is new. It incorporates the provisions of s. 79 of the English Act of 1948, as suggested in para 45 of the C. L. C. R. Only a few drafting improvements have been effected—*Notes on Clauses*.

The C. L. C. observe : "In paragraph 139 of the report the Cohen Committee referred to a practical difficulty caused by the indivisibility of share certificates, and recommended that the law as to the "certification of shares" should be clarified and placed beyond the reach of conflicting judicial decisions." (C. L. C. R., para 45).

In cl. (c) of sub-s. (2) of this section the words "or initials (whether hand written or not" after the words "authenticated by his signature" have been deleted by the Joint Committee (*vide* J.C.R., para 54).

The original cl. 107 of the Bill dealing with "Evidence of grant of probate or letters of administration" has been deleted by the Joint Committee with the following remark : "This clause, although a similar provision occurs in the English Act (Section 82), has been omitted as being unnecessary" (*vide* J. C. R., para 55).

### *Issue of Certificate of Shares, etc.*

**113. Limitation of time for issue of certificates.—(1)** Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the application for the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

The expression "transfer", for the purposes of this sub-section, means a transfer duly stamped and otherwise valid, and does not include any transfer which the company is for any reason entitled to refuse to register and does not register.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

(3) If any company on which a notice has been served requiring it to make good any default in complying with the provisions of sub-section (1), fails to make good the default within ten days after the service of the notice, the Court may, on the application of the person entitled to have the certificates or the debentures delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order ; and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default.

This section has been inserted by the Joint Committee with the following observation: "This simply reproduces original clause 379. The Committee consider that

the proper place for this provision is here" (*vide* J.C.R., para 56). This corresponds to s. 108 of the previous Act and s. 80 of the English Act of 1948.

**592X. Lien not to be entered** :—A company should not enter on the certificate any statement that it has a lien on the shares (95). A certificate is *prima facie* evidence of title of the person named therein (96).

**592A. Rights of holder in good faith** :—The holder in good faith for value of an untrue certificate has a right to damages against the company but not to the shares as against the true owner (97). If the certificate is a forgery, the company comes under no liability (98) even when the forgery was the act of its secretary (99).

**592B. Secretary's authority** :—In the absence of any evidence that the company has ever held out the secretary as having authority to do anything more than the mere ministerial act of delivering share certificates, when duly made, to the true owners of the shares, the company is not estopped by the forged certificate from disputing the claim of the plaintiffs or responsible to them for the wrongful action of the secretary (99).

**592C. Legal and equitable titles** :—The certificate only shows the legal title to the shares and accordingly the person who relies upon the certificate should get his title made complete by taking a transfer to his own name and getting his name registered; otherwise a previous equitable title, e.g., a mortgage may intervene (1).

**592D.** The statement usually contained in a certificate that no transfer will be registered without production of the certificate did not render the company liable for any loss arising to a person holding the certificate, nor was it a contract that a transfer would not be registered without its production. Such a note was a mere statement of the company's practice and was not a contract (2). But now see sub-s. (1) of s. 108.

Apart from this section the certificates should be issued within a reasonable time (3).

See notes to ss. 84 and 193.

### Share warrants

#### 114. Issue and effect of share warrants to bearer.—(1)

A public company limited by shares, if so authorised by its articles, may, with the previous approval of the Central Government, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares specified in the warrant.

(95) *W. Key & Son* [1902] 1 Ch. 467.

(96) S. 84.

(97) *Hart v. Frontino & Co.* [1870] L.R. 5 Ex 111; *Bahia & San Francisco Ry. Co.* [1868] L.R. 3 Q.B. 584.

(98) *Ottos Kopje Diamond Mines* [1893] 1 Ch. 618; but see *Balkis Consolidated Co. v. Tomkinson* [1893] A.C. 396.

(99) *Ruben v. Great Fingall Consolidated* [1906] A.C. 439.

(1) *Moore v. North Western Bank* [1891] 2 Ch. 599; *Peat v. Clayton* [1906] 1 Ch. 659.

(2) *Guy v. Waterlow* [1909] 25 T.L.R. 515.

(3) *Burdett v. Standard Exploration Co* [1899] 16 T.L.R. 112.

(2) The warrant aforesaid is in this Act referred to as a "share warrant".

(3) A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant.

**115. Share warrants and entries in register of members.**—(1) On the issue of a share warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member, and shall enter in that register the following particulars, namely :—

- (a) the fact of the issue of the warrant ;
- (b) a statement of the shares specified in the warrant, distinguishing each share by its number ; and
- (c) the date of the issue of the warrant.

(2) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering the warrant for cancellation and paying such fee to the company as the Board of directors may from time to time determine, to have his name entered as a member in the register of members.

(3) The company shall be responsible for any loss incurred by any person by reason of the company entering in its register of members the name of a bearer of a share warrant in respect of the shares therein specified, without the warrant being surrendered and cancelled.

(4) Until the warrant is surrendered, the particulars specified in sub-section (1) shall be deemed to be the particulars required by this Act to be entered in the register of members ; and, on the surrender, the date of the surrender shall be entered in that register.

(5) Subject to the provisions of this Act, the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, for any purposes defined in the articles.

(6) If default is made in complying with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine

which may extend to fifty rupees for every day during which the default continues.

SS. 114 and 115 are based on ss. 43-48 of the previous Act and ss. 83 and 112 of the English Act of 1948. The safeguards suggested by the Company Law Committee in para. 46 of the Report, *viz.* that the prior approval of the Central Government should be obtained for issue of bearer share warrants and that the articles of the company should specifically authorise the issue of such warrants, have been embodied in the sections—*Notes on Clauses*.

Alterations have been made in section 114 by the Joint Committee with the following remark: "For the word 'company' the words 'public company' have been substituted in sub-clause (1). There is no need to authorise a private company to issue bearer share-warrants (*vide* J.C.R., para 57).

593. In the case noted below it was contended that the power of a company to issue stock warrants to bearer has been impliedly repealed by the English Companies Act of 1929: *held*, that the Act kept alive the power to issue both classes of warrants to bearer (4).

594. Share-warrants to bearer are negotiable by mercantile usage and are transferable by delivery. So, even if it has been previously stolen, a subsequent innocent purchaser for value gets a good title (5).

### *Penalty for personation of shareholder*

**116. Penalty for personation of shareholder.**—If any person deceitfully personates an owner of any share or interest in a company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or attempts to obtain any such share or interest or any such share warrant or coupon, or receives or attempts to receive any money due to any such owner, he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

This section is new. It corresponds to s. 84 of the English Act of 1948 and is based on the following recommendation of C. L. C. R., para 237: "There is no provision in the Indian Companies Act for penalising the false personation of a shareholder. Section 84 of the English Companies Act, 1948, which reproduces section 71 of the English Companies Act, 1929, imposes heavy penalty on any person, who falsely and deceitfully personates any owner of any share or interest in any company, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon or receives or endeavours to receive any money due to any such owner. We suggest that a similar provision should be inserted in the Indian Companies Act under this Part of the Act."

It is, however, considered that the best place for this provision is here rather than in the place suggested by the C. L. C. The maximum penalty provided is 3 years' imprisonment—*Notes on Clauses*.

(4) *Pilkington v. United Rys. &c. Warehouses* [1931] 144 L.T. 115.

(5) *Webb, Hale & Co. v. Alexandra Water Co.* [1905] 93 L.T. 339, 21 T.L.R. 572

### *Special Provisions as to Debentures*

**117. Debentures with voting rights not to be issued hereafter.**—No company shall, after the commencement of this Act, issue any debentures carrying voting rights at any meeting of the company, whether generally or in respect of particular classes of business.

This section is new. It is based on the following recommendation of the C. L. C. in para 227 of their Report: "In view of the secured position of the former (*i.e.*, debenture-holders), under the usual terms of debenture trust-deeds, we consider it wrong in principle that their position should be further strengthened by giving them the right to vote on the same basis as the shareholders of the company. If debenture-holders possess voting rights, they may be in a position to influence the policy of the company in a manner which may be detrimental to the interests of the general body of shareholders. Apart from other abuses to which this practice is liable and on which we need not dilate in this context, we see no good reason for conferring voting rights on debenture-holders. A suitable provision should, therefore, be made at an appropriate place in the Act prohibiting this practice."

**118. Right to obtain copies of and inspect trust deed.**—(1) A copy of any trust deed for securing any issue of debentures shall be forwarded to the holder of any such debentures or any member of the company, at his request and within seven days of the making thereof, on payment—

(a) in the case of a printed trust deed, of the sum of one rupee ; and

(b) in the case of a trust deed which has not been printed, of six annas for every one hundred words or fractional part thereof required to be copied.

(2) If a copy is refused, or is not forwarded within the time specified in sub-section (1), the company, and every officer of the company who is in default, shall be punishable, for each offence, with fine which may extend to fifty rupees and with a further fine which may extend to twenty rupees for every day during which the offence continues.

(3) The Court may also, by order, direct that the copy required shall forthwith be sent to the person requiring it.

(4) The trust deed referred to in sub-section (1) shall also be open to inspection by any member or debenture holder of the company in the same manner, to the same extent, and on payment of the same fees, as if it were the register of members of the company.

This section is based on s. 125 of the previous Act and s. 87 of the English Act of 1948. The provision for inspection of the register of debenture holders has been incorporated in a later section, *viz.*, cl. 156 (now 163). Cl. 112 (now s. 118) has therefore been confined to the furnishing of a copy of the trust deed issued with respect to any debentures. Power has been given to compel the Court to order a copy of the trust deed to be supplied and the penalty has been confined to officers of the company in default—*Notes on Clauses*.

The Joint Committee have inserted the new sub-s. (4) where it has been provided that the documents referred to in this section should be open to inspection by any member or debenture-holder of the company concerned (*vide* J.C.R., para 58).

**595. Right to inspect:—**The right to inspect the register does not include the right to take extracts from or to take copies of the entries in the register (5a), a copy may however be obtained on payment of the prescribed fee. But see the case noted below (6) where it has been held that the right of inspection and perusal of the register of debenture stock holders given under this section includes a right to take copies. The fact that a person has taken his stock in a company at the instance of a rival company and for the purpose of serving the interest of the latter, does not disentitle him to the assistance of the Court in enforcing the statutory right (6). The holders of income stock certificates which fulfilled the characteristics of a debenture were entitled to inspection of the register thereof (7).

**596. Debenture trust-deed:—**The power conferred by a trust-deed in a majority must be exercised *bona fide* and the Court will interfere to prevent unfairness or oppression; but subject to this, each debenture-holder may vote with regard to his individual interests, though those interests may be peculiar to himself and not shared by other debenture-holders (8). A secret bargain by one debenture-holder for special treatment might be considered as corrupt; but there can be no question of bribery where a scheme openly provides for the separate treatment of persons with special interests (8).

**597. Trustee's remuneration:—**The trustees of a debenture-deed are not entitled to any remuneration, unless there is any provision therefor in the contract. The relation of trustee and *cestui que trust* excludes any idea of remuneration except by express antecedent contract (9).

**119. Liability of trustees for debenture holders.—(1)** Subject to the provisions of this section, any provision contained in a trust deed for securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, liability for breach of trust, where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions.

(5a) Balaghat Gold Mining Co. [1901] 2 K.B. 665.

(6) *Mutter v. Eastern & Midland Rys. Co.* [1888] 38 Ch. D. 92.

(7) *Lemon v. Austin Friars Investment Trust*, *supra*.

(8) *Goodfellow v. Nelson Line (Liverpool) Ltd.* [1912] 2 Ch. 324.

(9) *In re Accles* [1902] W.N. 164, 18 T.L.R. 786. See also the Indian Trusts Act (II of 1882), s. 50.



(2) Sub-section (1) shall not invalidate—

(a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release ; or

(b) any provision enabling such a release to be given—

(i) on the agreement thereto of a majority of not less than three-fourths in value of the debenture holders present and voting in person or, where proxies are permitted, by proxy, at a meeting summoned for the purpose ; and

(ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(3) Sub-section (1) shall not operate—

(a) to invalidate any provision in force at the commencement of this Act so long as any person then entitled to the benefit of that provision or afterwards given the benefit thereof under sub-section (4) remains a trustee of the deed in question ; or

(b) to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force.

(4) While any trustee of a trust deed remains entitled to the benefit of a provision saved by sub-section (3), the benefit of that provision may be given either—

(a) to all trustees of the deed, present and future ; or

(b) to any named trustees or proposed trustees thereof ; by a resolution passed by a majority of not less than three-fourths in value of the debenture holders present in person or, where proxies are permitted, by proxy, at a meeting called for the purpose in accordance with the provisions of the deed or, if the deed makes no provision for calling meetings, at a meeting called for the purpose in any manner approved by the Court.

This section is new. It corresponds to s. 88 of the English Act of 1948. Its incorporation is based on para 228 of the C. L. C. R. which says: "Both the Cohen Committee and the Millin Commission in South Africa recommended the adoption of the provisions embodied in this section of the English Act. The effect of this section is that a general provision in any trust-deed exempting the trustees for debenture-holders from liability is rendered void, but 'enabling' clauses as distinct from 'indemnity' clauses are permitted. This section does not affect the right of existing trustees, who retain whatever rights or indemnity they enjoyed before the Act, but prohibits the general exemption or indemnity in regard to new appointments. This provision in the English Act was designed to prevent the common practice, under

which most trustees for debenture-holders were appointed under trust-deeds containing the clause which absolved trustees from liability for anything but their wilful neglect or default. Trustees for debenture-holders should show the same degree of care and diligence in administering debenture trusts as are required of other trustees and we see no reason why they should be permitted to escape their liability where they do not do so. We, therefore recommend that a new section on the lines of section 88 of the English Act should be incorporated in the Indian Companies Act."

**120. Perpetual debentures.**—A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that thereby, the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.

This section corresponds to s. 126 of the previous Act and s. 89 of the English Act of 1948—*Notes on Clauses*.

**598. Clog on redemption:**—This section provides that a condition which would be a clog on the equity of redemption in the case of a mortgage given by an individual shall not be invalid in the case of debentures issued by a company (10). But it has been held that under the ordinary law any provision in a debenture or trust deed which amounts to a clog or fetter upon the company's power to redeem the property charged, whether specifically or by way of floating charge, is void in the case of a company as completely as in the case of an individual (11). It was held in England that a company authorized to borrow money on debentures had no power under its memorandum of association to issue irredeemable debenture stock (12). The equitable principle that a mortgage cannot be made irredeemable applies to other mortgage transactions of companies (13).

**599. Redemption of debentures:**—Where the debenture becomes enforceable on the happening of certain events, the debenture-holders have a right to require payment on the happening of those events, but they do not put the debenture-holders in a position of being compelled to accept payment. Where the events are entirely within the control of the company it cannot, by determining the event, compel the debenture-holders to accept his money at a moment's notice (14). But the debenture-holders cannot refuse to accept payment on the company being compulsorily wound up (15).

Where debentures become enforceable on the happening of certain events, but can only be compulsorily redeemed by the company by payment of a premium thereon, the guarantors of the interest of such debentures can give the usual notice to such debenture-holders and pay them off their principal and interest but without being under the necessity to pay them the premium that the company would have had to pay, if they had wished to pay off the debentures before the security became enforceable (15).

(10) *Sec Cuban Land Co.* [1921] 2 Ch. 147 at p. 151.

(11) *Kreglinger v. New Patagonia Meat & Co.* [1914] A.C. 25.

(12) *Southern Brazilian & Co.* [1905] 2 Ch. 78.

(13) *Knightsbridge Estates Trust v. Byrne* [1938] Ch. 741. See also *Samuel v. Jarrah Timber Corp.* [1904] A.C. 323, following *Noakes & Co. v. Rice* [1902] A.C. 24; *Kreglinger v. New Patagonia Meat Co.* [1914] A.C. 25; *De Beers Consolidated Mines v. British S. Africa Co.* [1910] 2 Ch. 502, [1912] A.C. 52.

(14) *General Motor Cab No. 2* [1912] 56 Sol. Jo. 573.

(15) *Consolidated Gold Fields v. Simmer & Jack East Ltd.* [1913] 82 L.J. Ch. 214, 108 L.T. 488.

**600. Effect of death of debenture-holder:—**The death of a registered holder of debentures does not relieve the company of the obligation to seek out its creditors, the company having been informed before who the person was to whom a tender should be made (16).

**601. Restriction on right of debenture-holder not illegal:—**The condition of debentures issued by a private company made the principal money thereby secured immediately payable in certain events and provided that "no action shall be taken under this debenture except with the consent in writing of a majority of the debenture-holders" the meaning of the terms being defined. The principal money secured by some of the debentures became payable under the conditions and an action was brought to recover the principal with interest. The consent in writing mentioned above had not however been obtained. It was held: (1) that there was nothing illegal in a restriction in a debenture deed on the rights of a debenture-holder, so that a provision that a majority of the debenture-holders might by resolution modify the terms of the debentures or fetter or restrict the rights of the debenture-holders was legitimate, provided that the majority acted in good faith and not by way of oppressing any individual debenture-holder; (2) that the condition under consideration was not repugnant to the previous condition making the principal money immediately payable in certain events, and, as it was a condition precedent which had not been fulfilled, judgment was given for the defendant (17).

**602. Construction of debenture deed:—**A company issued debentures which it covenanted to pay off "on or after January 1st, 1898," the debentures to be paid off being selected by ballot, and six months' notice being given to the holders thereof. The company contended that the debentures were repayable after the above date only after a ballot had been held and six months' notice had been given to the holders of the drawn debentures. It was held, that inasmuch as the covenant created a liability to pay off on or after the date specified upon demand, the clause seeking to limit its operation to such debentures as should be drawn by ballot was void for repugnancy (18).

Where the combined effect of the debentures and trust-deed executed by a company was to give a floating charge on its assets and it was provided thereon that the principal money thereby secured should become immediately payable if an order was made or an effective resolution passed for winding up the company, it was held that when the business of the company came to an end by winding up the security ceased to be a floating one and the debentures became immediately payable and the security became enforceable (19). As to how the amount due to each debenture-holder for interest and principal should be calculated in a case where a series of debentures are issued to rank *pari passu* as a floating charge, see the case noted below (20).

Stock which is expressed to be "redeemable" at the option of the company is not repayable on the demand of the holder (21).

**603. Power to modify terms:—**To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient even in the interest of the class of debenture-holders as a whole. The provision is usually made in the form of a power conferred by the instrument constituting the debenture security upon the majority of the class of holders. It often enables them to modify by special resolution properly passed the security itself. The provision of such a power given

(16) *Fowler v. Midland Electric Corp.* [1917] 1 Ch. 656.

(17) *Pethybridge v. Unibifocal Co.* [1918] W.N. 278.

(18) *Tewkesbury Gas Co.* [1911] 2 Ch. 279, affirmed on appeal [1912] 1 Ch. 1.

(19) *Player v. Crompton & Co.* [1914] 1 Ch. 954.

(20) *Midland Express Ltd.* [1914] 1 Ch. 41.

(21) *Council of Edinburgh v. British Linen Bank* [1913] A.C. 133.

to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908 (s. 31 of the present Act) which enables a majority of the shareholders by a special resolution to alter the articles of association (22).

**121. Power to re-issue redeemed debentures in certain cases.—**(1) Where either before or after the commencement of this Act, a company has redeemed any debentures previously issued, then,—

(a) unless any provision to the contrary, whether express or implied, is contained in the articles, or in the conditions of issue, or in any contract entered into by the company ; or

(b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled ;

the company shall have, and shall be deemed always to have had, the right to keep the debentures alive for the purposes of re-issue ; and in exercising such a right, the company shall have, and shall be deemed always to have had, power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.

(2) Upon such re-issue, the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had never been redeemed.

(3) Where with the object of keeping debentures alive for the purpose of re-issue, they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(4) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(5) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the

(22) *British America Nickel Corpn. v. M. I. O'Brien, Ltd.* [1927] A.C. 369. [1927] P.C. 62.

re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued :

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped ; but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(6) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made ;

(b) where an appeal has been preferred against any such decree or order, the operation of any decree or order passed on such appeal, as between the parties to such appeal ; or

(c) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

This section corresponds to s. 127 of the previous Act and s. 89 of the English Act of 1948.

This was originally cl. 115 of the Bill, sub-s. 1 (b) of which has been omitted by the Joint Committee as being unnecessary (*vide* J.C.R., para 59).

**604. Scope :—**The intention of this section is not that the debentures can be made perpetual debentures by the postponement on a re-issue of the date of redemption, but to give the power only to revive the original transaction, not power to enter into a new and different transaction (23). The power to re-issue debentures cannot extend to give the company power to issue debentures which are not the same in their terms, as the original debentures (23).

**605. Effect of sub-s. (1) :—**Sub-sec. (1) nullifies the decision of the Court of Appeal in *George Routledge & Sons* (24) which declared that a company could not re-issue any debenture which it had paid off unless it was a condition of the original issue that the company should have such power.

(23) *Autofagasta &c. Ry. Co.'s Trust Deed* [1939] Ch. 732.

(24) [1904] 2 Ch. 474. See also *Tasker & Sons* [1905] 2 Ch. 587, and *Russian P. & L. Fuel Co.* [1907] 2 Ch. 540.

In sub-sec. (1) the word "always" means "before" the passing of the Act of 1913 (25).

**606. Effect of SUB-S. (4) :—**Sub-sec. (4) counteracts the effect of *London Petroleum &c. Trust v. Russian Petroleum Co.* (26) in which it was held in a case where debentures were deposited to secure advances on current account and the advances were repaid while the debentures remained so deposited, that the debentures had been redeemed and the security was gone.

**607. Section is retrospective :—**This section is retrospective except as to cases decided by a Court of competent jurisdiction before 25th February, 1910. A winding up order made before that date is not an "order" within the meaning of sub-sec. (6) (27).

**122. Specific performance of contract to subscribe for debentures.—**A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

This section corresponds to s. 128 of the previous Act and s. 92 of the English Act of 1948—*Notes on Clauses*.

**607A. Specific performance :—**In the case of debentures issued by a company this section relaxes the rule that specific performance cannot be granted in respect of a contract to lend money even to a company as was held in *South African Territories v. Wallington* (28). The ordinary rule is that a contract to lend money simply or on a mortgage cannot be specifically enforced, compensation in money being an adequate relief (29). "Until s. 16 of the (Eng.) Companies Act, 1907, reproduced by this (s. 76 of Act of 1929) section, specific performance of such an agreement could not be enforced. The measure of damages on breach of such a contract was merely the actual loss by the breach. The company could not sue for the amount of the debenture or of the instalments unpaid thereon" (30). Where a loan has been made, the Court will however decree specific performance of an agreement to give security (31).

**608. Where it will not be granted :—**A company after forfeiting debentures for failure to pay calls is not entitled under this section to an order for specific performance of a contract to take and pay for debentures, notwithstanding the articles of association containing a stipulation purporting to be applicable to such debentures, that a shareholder after forfeiture of shares shall still be liable for calls as if the shares had not been forfeited (32).

(25) *Fitzgerald v. Pearse* [1908] 1 I.R. 279.

(26) [1907] 2 Ch. 540.

(27) *New London & Suburban Co.* [1908] 1 Ch. 621.

(28) [1898] A.C. 309.

(29) See s. 21, cl. (2), Specific Relief Act (1 of 1877) and *Western Wagon and Property Co. v. West* [1892] 1 Ch. 271; *Rogers v. Challis* [1859] 27 Beav. 175 at pp. 178, 179; *Sheikh Galim v. Sadarjan Bibi* [1915] 43 Cal. 59; *Ram Het v. Pokhar* [1931] 7 Luck. 237; *Sichel v. Mosenthal* [1862] 30 Beav. 371 (377); *Sew Singh v. Mukha Singh* [1936] 1 L. 727, 17 Lah. 270, 164 I.C. 582; *Larios v. Gurtey* [1873] 1 L.R. 5 P.C. 346 (354).

(30) *Buckley*, 11th ed., p. 159.

(31) *Hermann v. Hodges* [1873] 16 Eq. 18.

(32) *Kuala Pahi Rubber Estate v. Mowbray* [1914] W.N. 321, 111, 1 T. 1072.

**123. Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.—**

(1) Where either—

(a) a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge ;  
or

(b) possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge ;

then, if the company is not at the time in course of being wound up, the debts which in every winding up are, under the provisions of Part VII relating to preferential payments, to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) In the application of the provisions aforesaid, section 530 shall be construed as if the provision for payment of accrued holiday remuneration becoming payable on the termination of employment before or by the effect of the winding-up order or resolution were a provision for payment of such remuneration becoming payable on the termination of employment before or by the effect of the appointment of the receiver or possession being taken as aforesaid.

(3) The periods of time mentioned in the said provisions of Part VII shall be reckoned from the date of appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(4) Where the date referred to in sub-section (3) occurred before the commencement of this Act, sub-sections (1) and (3) shall have effect with the substitution, for references to the said provisions of Part VII, of references to the provisions which, by virtue of sub-section (9) of section 530, are deemed to remain in force in the case therein mentioned, and sub-section (2) shall not apply.

(5) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

This section corresponds to s. 129 of the previous Act and s. 94 of the English Act of 1948—*Notes on Clauses*.

This was originally cl. 117 of the Bill. The Joint Committee have inserted the new sub-ss. (2) and (4).

**609.** The debts entitled to preferential payment in the winding up are specified in s. 530. For cases see notes to that section.

**610.** Sub-s. (1) is not merely a negative provision whereby the receiver is under no duty to make preferential payments so long as he does not pay the debenture-holders, but it requires the receiver to pay the preferential creditors out of any assets coming to his hands. Therefore where the receiver had assets in 1945 out of which he could have paid the authority but had not done so, he was liable to them in tort (33).

**611. Preferential payments** :—Where a receiver is appointed or takes possession of property as mentioned in this section, the right of preferential payment of one year's assessment of income-tax remains notwithstanding that the assessment is not made until after the date of appointment of the receiver or of his taking possession (34). A receiver and manager appointed by the debenture-holders, who, after notice of any claim that is preferential under the section, pays away the company's assets to ordinary creditors in the process of carrying on its business without making or attempting to make any provision for the preferential claim, is guilty of a breach of the provisions of this section and is liable in damages (35).

It was held in *Lewis Merthyr Consolidated Collieries* (36) that the preferential rights of creditors over those of debenture-holders applied only to the property secured by a floating charge. Therefore where the floating charge over certain property ceased to float, directly a receiver was appointed, but had become crystallized by the appointment, the creditors had no right under the Act to be paid in priority to the debenture holders out of the assets comprised in that property. But the creditors will have priority in respect of other property over which no receiver was appointed (37).

The claims of the rating authority of the district in which certain properties of a company were situated could not be put higher than the claims of ordinary creditors when in competition with the rights of secured creditors (38). It appears that in this case the company was not in liquidation and a receiver and manager was appointed out of Court under a power contained in the debenture deed. See also *British Fullers' Earth Co., Ltd.* (39) where it has been held that a rating authority has no right to rank ahead of ordinary creditors against sums in the hands of the receiver for debenture-holders, since the appropriate remedy is by distress.

**612. Order of payments** :—When in a debenture-holder's action the assets prove insufficient, they are applicable in the following order: (1) costs of realization, (2) costs including remuneration of the receiver, (3) costs, charges and expenses of debenture trust-deed including the trustees' remuneration, (4) plaintiff's costs of action, (5) preferential creditors and lastly (6) the debenture-holders (40). For what has been held to be preferential payment under this section see the cases noted below (41).

**613. Priority** :—When the receiver is appointed by a debenture-holder whose debenture is secured by both a fixed and a floating charge, the priority given to the

(33) *Westminster City Council v. Haste* [1950] 2 A.E.R. 65.

(34) *Gowers v. Walker* [1930] 1 Ch. 262.

(35) *Woods v. Winskill* [1913] 2 Ch. 303; *Westminster City Council v. Haste* [1950] 2 A.E.R. 65.

(36) [1929] 1 Ch. 408.

(37) *Griffin Hotel Co., Joshua Tetley & Sons, Ltd. v. The Company* [1911] 165 L.T. 57.

(38) *Mayfair & General Property Trust, Ltd.* [1945] 2 All E.R. 523.

(39) [1901] 17 T.L.R. 232.

(40) *Glynocorrwg Colliery Co.* [1926] Ch. 951.

(41) *Ind, Coope & Co.* [1911] 2 Ch. 223; *National P. Bank v. United Electric Theatres* [1916] 1 Ch. 132; *Ashley & Smith Ltd.* [1918] 2 Ch. 378.



preferential debts applies only in respect of assets subject to the floating charge (42). In the last noted case at p. 512 Lawrence L. J., observes: "S. 107 (s. 123 of the Indian Act) is directed specifically to debentures secured by a floating charge and to those only and intended to provide for the payment out of the assets subject to the floating charge of those debts which under the provisions of s. 209 (s. 530 of the Indian Act) would be entitled to priority in the case of a winding-up in priority to the claims of the debenture-holders under the floating charge. In my judgment the fact that the debenture in the present case is one which combines with the floating charge a fixed charge, does not bring the section into operation as against the assets comprised in the fixed charge."

A mill company issued mortgage debentures and created in favour of the debenture-holders a fixed charge on its immovable properties and a floating charge on rest of its properties and undertaking. In the suit by the debenture-holders to enforce their security a receiver was appointed by the Court for the protection of the property. The mill hands had not been paid for at least three months and had gone on strike creating a disturbance which threatened the safety of the company's property. The receiver was therefore authorized by the Court to raise money on such terms as he might think proper. In pursuance of that authority the receiver entered into an agreement with A under which A lent Rs. 31,000 to the receiver to pay salaries of the mill employees and took away the moveable properties of the company which A claimed to have purchased and it was agreed *inter alia* that if the goods removed by A were found to be the property of or under lien to A, then the receiver shall hypothecate to A sufficient property worth Rs. 60,000. Held (1) that as the goods were found to be the property of A, the receiver became bound to hypothecate to A property worth Rs. 60,000; (2) that though under the terms of the aforesaid agreement the lender A shall be subrogated to the same rights of preferential payment as the relevant sections of the Companies Act prescribed for labourers and workmen, and in a debenture-holder's action, as in a winding up of the company, this preferential right was limited to the property subject to a floating charge; (3) that A was entitled to a charge in priority to the debenture holders, and the fact that there was not in fact any hypothecation to A could not help the debenture-holders, for against them an agreement to hypothecate was as effectual as an actual hypothecation; and (4) that under the authority given by the Court the receiver could validly raise money by a charge on the company's property ranking in front of the debentures (43).

A receiver appointed at the instance of a debenture holder cannot be allowed to disregard the forward contracts entered into by the company before the appointment of the receiver (44).

**614. Jeopardy:** Debenture-holders, who have a floating security upon the undertaking and all the property, present and future, of a company, are entitled to the appointment of a receiver of the property subject to the debentures, if their security is in jeopardy, although nothing is payable in respect of principal or interest and there has been no default or breach of contract by the company (45). The security of the debenture-holders cannot be said to be "in jeopardy" unless there is a risk of some portion of it being seized or taken to pay claims which are not really prior to the claims of the debenture-holders. The Court refused to appoint a receiver on the ground of jeopardy where the debenture-holders merely showed that

(42) *Lewis M. C. Collieries* [1929] 1 Ch. 498 (C.A.) followed in *John v. Suraj Bhan* [1938] All. 869, [1938] A. 609.

(43) *Laxman v. John* [1945] P.C. 121.

(44) *Newdigate Colliery Ltd.* [1912] 1 Ch. 468.

(45) *London Pressed Hinge Co.* [1905] 1 Ch. 576.

their security, if realized, would be insufficient to pay the principal and interest in full, but could not show any damage or outside creditors seizing the assets (46).

There is jeopardy where practically the only asset of a company consists in its reserve fund and the company proposes to distribute that among its shareholders without making provision for the debenture-holders. In such a case where nothing has otherwise occurred to make the debenture security enforceable, the Court appointed a receiver and this *ipso facto* made the debenture security enforceable (47).

The jeopardy must be from some act which would be wrongful as against the debenture-holder, or which would amount to a destruction of his security. If there is a specific charge on part of the assets and a floating charge on the rest and execution is threatened against the former, it will be a ground for the appointment of a receiver (48).

**615. Receiver :-** The section applies even if the receiver is appointed by the debenture-holders and not by the Court (49). A receiver appointed in a debenture-holder's action may claim recoupment under this section of rates paid by him (50).

**616. Trustees' remuneration :-** If the debenture trust-deed so provide, the trustees are entitled to remuneration in priority of the debenture stock holders, but such remuneration does not continue after the appointment of a receiver (51).

**617. Floating charge :-** A floating security remains dormant and cannot become fixed or crystalized until the company ceases to be a going concern or until the debenture-holders intervene by applying for a receiver or otherwise (52). "A floating charge is a present charge though it does not finally attach or crystalize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of its business" (53). As to what constitutes a floating security see *National P. Bank v. United Electric Theatres* (54).

So long as the debentures continued to be a floating charge, that is, until the appointment of a receiver, they could not prevent the company's solicitor from acquiring the ordinary solicitor's lien given by the general law and not a charge created by the company (55). As service of a garnishee order *nisi* did not operate as an assignment in equity or amount to a transfer of the debt, the right of the garnishor was subject to the floating security of the debenture-holders which was capable of becoming a specific charge when the debenture-holders intervened (56).

**618. Employment of agent :-** Where a receiver appointed by the Court in a debenture-holder's action employs an agent to introduce a purchaser of property belonging to the company without leave of the Court, the agent, even if successful in finding a purchaser, is not entitled to any commission. The Court will however consider such a case on its merits, and in a proper case it is open to the Court to

(46) *New York Taxi Cab Co.* [1913] 1 Ch. 1.

(47) *Tilt Cove Copper Co.* [1913] 2 Ch. 588 (*New York Taxi Cab Co.*, supra was distinguished).

(48) *Grigson v. George Taplin & Co.* [1915] 112 L.T. 985.

(49) *Barnby's Ltd.* [1899] W.N. 103.

(50) *Mannesman Tube Co.* [1901] 2 Ch. 93.

(51) *Locke & Smith Ltd.* [1914] 1 Ch. 687.

(52) *Nallaperumall v. Krishna* [1915] 29 M.L.J. 110, 30 J.C. 286

(53) *Imperial Bank v. Bengal National Bank* [1931] C. 223, 58 Cal. 136, 34 C.W.N. 605, 53 C.L.J. 269 -per Rankin C.J. This case has been reversed in the Privy Council, but not on this point; *vide Imperial Bank v. Bengal National Bank* [1931] P.C. 245, 58 I.A. 323, 55 C.W.N. 1035.

(54) [1916] 1 Ch. 32.

(55) *Burton Electrical Engineering Corpn.* [1892] 1 Ch. 434.

(56) *Norton v. Yates* [1906] 1 K.B. 112.

say that it is not equitable to take advantage of the agent's efforts without some compensation to him, the amount of such compensation to be entirely in the discretion of the Court (57).

## PART V

### REGISTRATION OF CHARGES

This Part corresponds to Part III of the English Act of 1948. As in the English Act it is considered desirable to put all the provisions relating to the registration of charges and the like in a separate Part—*Notes on Clauses*.

**124. “Charge” to include mortgage in this Part.—**In this Part, the expression “charge” includes a mortgage.

This section is new. It is merely intended to simplify the drafting of the subsequent sections in this Part—*Notes on Clauses*.

**125. Certain charges to be void against liquidator or creditors unless registered.—**(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within twenty-one days after the date of its creation.

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges :—

\* (a) a charge for the purpose of securing any issue of debentures ;

(b) a charge on uncalled share capital of the company ;

(c) a charge on any immovable property, wherever situate, or any interest therein ;

(d) a charge on any book debts of the company ;

(e) a charge, not being a pledge, on any movable property of the company ;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade ;

(g) a charge on calls made but not paid ;

(h) a charge on a ship or any share in a ship ;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

(5) In the case of a charge created out of India and comprising solely property situate outside India, twenty-one days after the date on which the instrument creating or evidencing the charge or a copy thereof could, in due course of post and if despatched with due diligence, have been received in India, shall be substituted for twenty-one days after the date of the creation of the charge, as the time within which the particulars and instrument or copy are to be filed with the Registrar.

(6) Where a charge is created in India but comprises property outside India, the instrument creating or purporting to create the charge under this section or a copy thereof verified in the prescribed manner, may be filed for registration, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(7) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.

(8) The holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property.

This section corresponds to sub-s. (1) of s. 109 of the previous Act and s. 95 of the English Act of 1948. The question of the amendment of the Indian Registration Act suggested in para 226 of the C.I.C.R. will be taken up separately. The other alterations suggested to s. 109 of the previous Act at p. 302 of the Report have been embodied in this section- *Notes on Clauses*.

The C.I.C.'s suggestion in para 226 was the amendment of the Indian Registration Act so that a floating charge can be registered under Book I, which is available for inspections by the public.

The Joint Committee have made in this section which was originally cl 119 of the Bill the following observation -- "The Committee are of the opinion that the

words 'but not including a charge for any rent or other periodical sum issuing out of land in sub-clause 4 (c) of the original clause 119 should be omitted as they do not occur in the corresponding provision in s. 109 of the existing Indian Act. The reference to "stock-trade" in sub-clause 4 (c) has been omitted by the Committee. Sub-clause (g) has also been omitted as being unnecessary" (*vide* J.C.R., para 60). The Joint Committee have also added the words "including stock-in-trade" at the end of sub-clause (4) (f).

**India :—**For definition see s. 2 (20) and Note 33 *ante*.

**618A. Scope :—**The provisions of this section relating to a mortgage or charge created by a company do not apply to a charge arising by operation of law (58).

**619. Meaning of "debenture" :—**A "debenture" means a document which either creates or acknowledges a debt (59). It is usually associated with a corporation of some kind. Debentures are usually bonds issued by a company for Rs. 100, and are offered to the public by means of a prospectus in the same manner as shares. The application for and allotment of debentures are also similar to those in the case of shares (60).

See notes to s. 2 (12).

**620. "Charge" :—**As to what a "charge" is the following observation of Lord Justice Atkin should be borne in mind: "I think there can be no doubt that where in a transaction for value both parties evince an intention that property existing or future shall be made available as security for the payment of a debt and that the creditors shall have a present right to have it made available, there is a charge even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets the right to have the security made available by an order of the Court. . . . . If on the other hand the parties do not intend that there should be a present right to have the security made available, but only that there should be a right in the future by agreement such as a license to seize goods, there will be no charge." (61). A letter of lien given along with a promissory note by way of collateral security over the stock-in-trade &c. creates a goods equitable charge on the existing assets (62).

No precise form is necessary for the creation of a charge or mortgage whether on immovable property or movable property, and it is sufficient if the intention to create it appears clear, and in ascertaining the intention the form of expression, the literal sense is not to be so much regarded as the real meaning which the transaction discloses (91). The writing need not contain any express words giving the obligee the power of bringing the property to sale, but there must be sufficient language from which such powers may reasonably be implied (63).

A company cannot plead its own incompetence on the ground that there was no minimum number of directors authorizing creation of the charge and that there was no resolution of the board where the charge-holder had no notice of the irregularities (64).

As to the meaning of "charge" on immovable property and the mode of enforcement of such a charge see s. 100 of the Transfer of Property Act (IV of 1882)

(58) *Hukum Chand v. Pioneer Mills* [1927] O. 55, 99 I.C. 483.

(59) *Levy v. Abercorris Slate & Slab Co.* [1887] 38 Ch. D. 260 at p. 264.

(60) See *Gore-Browne*, 36th ed., p. 226.

(61) *National P. & U. Bank v. Charnley* [1924] 1 K.B. 431 at pp. 449-50.

(62) See *In re Summers* [1896] 23 Cal. 592.

(63) *Bank of India v. Rustom Fakirje* [1955] B. 419, 57 Bom. L.R. 850.

(64) *Shivlal v. Tricumdas Mills Co.* [1911] 36 Bom. 564, 14 Bom. L.R. 45.

and as to the distinction between a charge and a mortgage see Note 528 of B. B. Mitra's *Transfer of Property Act*, 11th ed. (1955).

Where motor vans were garaged at the factory and loaded there with product of the factory, they were held to be plants within the meaning of the deed of charge (65).

**621. Fixed & floating charges** :—The charge may be either 'fixed' or 'floating'. When the charge is 'fixed' it affects the title to the property and the company can only deal with the property affected subject to the charge. But when the charge is a 'floating' one the company may, in the ordinary course of business, deal with the property covered by the charge, mortgaging, selling, disposing of it or using it up as the business requires, at any time before the charge attaches (66). The term 'floating security' and 'floating charge' are synonymous (67). Lord Macnaghten lays down the principle that "a floating security is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying conditions it happens to be from time to time. It is of the essence of such a charge that it remains dominant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no suspension, he may exercise his right whenever he pleases after default" (67). For the meaning of 'floating charge' see the case noted below (68). "A floating charge on the assets of a company for the time being is a similar instance of a charge being created on property not in existence at the time when the loan is advanced, but which is acquired subsequently" (69).

In the case of a fixed charge for the recovery of a specific sum of money from a specific property, a transfer of an interest immediately takes place when the charge is created, while a floating charge for the recovery of money from the general assets is contingent, that is, on the occurrence of some event a fixed sum of money becomes recoverable from the specific assets which are in existence at the time. When the contingency arises, the charge is crystalized and then becomes a fixed charge. A floating charge is an agreement by which the creator of the charge stipulates that in the event of certain contingency an interest in the property, which happens to be in his possession at the time, shall be conveyed to the holder of that charge (70).

A floating charge on a part of a company's property is within the section (71). The principal tests whether the charge is a floating one are : *first*, if it is a charge upon all of a certain class of assets, present or future, *secondly*, if the assets charged would, in the ordinary course of business, be changing from time to time and *thirdly*, if expressly or by necessary implication the company has the power, until some step is taken by the debenture-holders or trustees, of carrying on its business in the ordinary way so far as regards the assets charged (72). In this last cited case the House of Lords held that a general charge on book-debts, present or future, was a floating charge, although not expressed to be so and that it required registration (72).

(65) *National P. & U. Bank v. Charnley* [1924] 1 K.B. 431.

(66) *Florence Land &c. Co.* [1878] 10 Ch. D. 530; *Wheatley v. Silkstone &c. Coal Co.* [1885] 29 Ch. D. 715; *Low & Co. v. Pulin* [1939] C. 154, 59 Cal. 1372.

(67) *Illingworth v. Houldsworth* [1904] A.C. 355; *Panama &c. Mail Co.* [1870] 5 Ch. App. 318.

(68) *Govt. Stock &c. Investment Co. v. Manila Ry. Co.* [1897] A.C. 81 at p. 86.

(69) *Kabul Chand v. Badri Das* [1938] A. 22 (25), [1938] All. 63, 173 I.C. 130—per Niamatulla J.

(70) *U. P. Government v. Manmohan* [1941] A. 315 (F.B.) at p. 348.

(71) *Houldsworth v. Yorkshire Wool Combers' Assn.* [1903] 2 Ch. 284; *Bala-subrahmanian v. Kandasami* [1916] 32 I.C. 91; see also *Imperial Bank of India v. Bengal National Bank* [1931] P.C. 245 at p. 247, 58 I.C. 323, 35 C.W.N. 1034; *Maheswari Bros. v. O. L. Indra Sugar Works* [1938] A. 574, [1938] All. 896.

(72) *Illingworth v. Houldsworth*, supra.

An agreement between the parties that the amount paid to the company will be a second charge on the machinery and other goods of the company creates a floating charge, that is, a charge which would fasten on the property that might exist when the time arrived for the charge to be enforced, and would be void under s. 109 of the old Act for non-registration (73).

When the directors of a company pledge its movable assets but they remain in possession as agents of the pledgee, a floating charge is created and if it is not registered, it is void against the liquidator (74).

Money paid to the sheriff as a trade debt owing by a company to the execution creditor cannot be claimed by the receiver appointed by debenture-holders having a floating charge on the assets of the company (75).

It is not an incident of a floating charge that the company can create further floating charge ranking *pari passu* with or in priority to it (76). In the under-noted case in the Calcutta High Court Rankin C. J. sitting with Mukherp J. has discussed the question of "floating charge" elaborately and their lordships have held that where there are other elements of a floating charge but possession is given to the lender, this prevents the charge being a floating one (77).

**622. Right of debenture holder** :- A debenture-holder cannot single out and take a particular debt or piece of property while allowing the company to trade with the rest of its assets (78). Where the debenture deed after charging the assets of the company provided that notwithstanding such charge the company should carry on business and deal with the assets of the company until default was made for six months in the payment of the principal and on such default the charge should be immediately enforceable, but notwithstanding such default the debenture-holder allowed the business to go on, it was held that a charge created in favour of the secretary and manager for their salary could not be avoided but they could not take advantage of this, as the charge in their favour was not registered as required by this section (79). If the debenture gives no security on the assets of the company, the debenture-holder's position is no better than that of an unsecured creditor (80). Words in a debenture prohibiting a company from creating a prior charge are to be read strictly, and they do not extend to defeat the rights obtained under a grainshee order (81). The conduct of a debenture-holder's action begun by a person whose transactions with the company require investigation, or whose interests are shown to be adverse to the remaining debenture-holders, may be given by the Court to an independent party (82). Where the security of the debenture holders is limited to block, machinery, stores and goods, it does not extend to the usufruct of the property and money realized from leases (83).

When a company has power to issue legally transferable securities, an irregularity in the issue cannot be set up against even the original holder if he has a right

(73) *Maheshwari Brothers v. O. L., Indra Sugar Works* [1942] A 119 (F.B.), [1942] A.L.J. 75.

(74) *D. Pudumjee & Co. v. Moos* [1926] B. 28, 27 Bom. L.R. 1218, following *Illingworth v. Houldsworth* (supra).

(75) *Heaton & Duggard Ltd. v. Cutting Bros. Ltd.* [1925] 1 K.B. 655 approving *Robinson v. Burnell's Vienna Bakery Co.* [1904] 2 K.B. 624.

(76) *Benjamin Cope and Sons* [1914] 1 Ch. 800.

(77) *J. D. Jones & Co. v. Ranjit Roy* [1927] C. 682, 54 Cal. 513, 103 I.C. 748.

(78) *Robson v. Smith* [1895] 2 Ch. 118, approved by C. A., in *Evans v. Rival Granite Quarries* [1910] 2 K.B. 979.

(79) *Gopala Krishna v. Kandaswamy* [1914] 32 I.C. 91.

(80) *Spiral Globe Ltd.* [1902] 1 Ch. 396.

(81) *Robson v. Smith* [1895] 2 Ch. 118, approved by C. A. in *Evans v. Rival Granite Quarries* [1910] 2 K.B. 969.

(82) *Service Club E. Syndicate* [1930] 1 Ch. 78.

(83) *Peoples Bank of N. India v. Lucknow Sugar Works* [1936] 163 I.C. 194.

to presume *omnia rite acta*. Such irregularity, and *a fortiori* any equity against the original holder cannot be asserted by the company against a *bona fide* transferee for value without notice, nor can such equity be set up against an equitable transferee whether the securities were transferable at law or not, if by original conduct of the company in issuing the securities or by their subsequent dealing with the transferee he had a superior equity (84).

When certain goods secured by a floating charge of debentures were seized by the sheriff under a *fi fa*, it was held that the rights of the debenture-holders prevailed over those of the execution-creditors, because there was no interest of the company in them to satisfy the judgment debt (85). In the last cited case no winding up resolution was passed and no receiver appointed, nor did the trustee for the debenture-holders put in force his powers under the deed.

In an action against a company to enforce a mortgage by foreclosure all the holders of debentures which rank after the mortgage must be made parties as persons interested in the equity of redemption. A single debenture-holder cannot be appointed to represent as defendant all debenture-holders belonging to the same class (86). A single debenture-stock holder cannot proceed in tort against persons who have acted as directors of a debtor company or of the company which owns all the shares of the debtor company. A representative action on behalf of all the stockholders, an action in the name or on behalf of the company, proceedings to compel the trustees to do their duty and take steps to protect the security, or proceedings against individual directors for misfeasance to the company give a sufficient well established body of remedies (87).

Debentures may be issued in respect of existing debts (88). The condition in a debenture that payment is to be made at a certain time and place is not broken unless demand is made by the debenture-holder at that place (89). A provision in the articles that irregularities shall not affect the debentures will protect a *bona fide* holder of debentures (90).

**623. Different kinds of debentures** :—Debentures may be for a fixed term of years or repayable on notice, or irredeemable (91). They can be formed as to be payable to bearer. The custom to treat debentures to bearers as negotiable by delivery is recognized by the law merchant (92). See notes to s. 2, cl. (12).

**624. Specific charge and floating charge** :—Mortgage debentures usually contain a charge upon the undertaking of the company and all its property, real or personal, whether present or future, and may or may not give a charge upon uncalled capital. "A specific charge is one that without more fastens on ascertained or definite property or property capable of being ascertained and defined, whereas a floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp" (93). Where by the debenture the company charged its undertaking, all its property, present and future, including its uncalled

(84) Bomford Canal Co. [1883] 24 Ch. D. 85.

(85) Davey & Co. v. Williamson & Sons., Ltd. [1898] 2 Q.B. 194.

(86) Westminster Bank v. Residential Properties Improvement Co. [1898] Ch. 639; Griffith v. Pound [1890] 45 Ch. D. 533; Wallace v. Evershed [1899] 1 Ch. 891.

(87) Clark v. Urquhart [1930] A.C. 28 (33).

(88) Seligman v. Prince & Co. [1895] 2 Ch. 617.

(89) Escalera Silver Co. [1908] 25 T.L.R. 87.

(90) Davies v. R. Bolton & Co. [1894] 3 Ch. 678.

(91) Wiley v. Stocks [1909] 26 T.L.R. 41, [1912] 2 Ch. 134 note.

(92) Johnston Foreign Patents Co. [1904] 2 Ch. 234.

(93) Per Lord Macnaghten in Illingworth v. Houldsworth (supra) at p. 358.



capital, the property included in the charge consisted of every asset of the company including its right to the renewal of a lease (94).

**625. Notice** :—Registration is notice to all the world of the existence of the debentures, but not of their contents (95). A bank having notice that there were debentures which required to be filed, or of the existence of the debentures ranking in priority to others, is not to be held to have notice of the terms of such debentures so as to preclude it from making advances on a specific mortgage (95) or equitable mortgage (96).

**626. Where debentures are issued but not registered** :—When debentures have been issued but not registered, the company may, at any time before liquidation, by arrangement with the holders, cancel the debentures and issue a new series in their place registering the new issue within 21 days (97). A deliberate issuing of substituted debentures every 14 days to avoid registration does not invalidate the final debenture if registered within 21 days of its issue (97). One debenture may be issued in the place of several redeemed debentures (98).

Where the time for registration has been exceeded, the company can by agreement with the lender cancel the unregistered debentures and issue fresh ones in place of them (99).

**627. Joint debentures** :—If several companies issue joint debentures to secure a fund advanced for their mutual benefit, a valid charge will be created on the assets of each company to the extent to which the fund has been applied to the purposes of that company (1).

**628. Place of payment** :—Where no place for payment of a debenture is provided, the company must seek out the creditors, if within the reach, and pay them (2). Where there is a condition for payment of a sum at a time and place certain, the condition is not broken by non payment at the time unless the demand for payment is made at the specified place (3).

**629. Specific performance** :—The right to specific performance of the terms of a debenture would be destroyed where the company having power to do so forfeited the debentures for non-payment of calls (4).

**630. Holder of security may fall between two stools** :—The holder of a security may fall between two stools; as when a lender had registered an agreement to give him a floating charge and subsequently obtained within three months of the winding up a debenture containing the agreed charge, it was held that neither the agreement nor the debenture was enforceable (5).

**631. Seal** :—In the absence of a special provision in the articles a mortgage debenture does not require seal. Even if the articles require debentures to be sealed, an unsealed debenture is good as an agreement to give a debenture (6).

(94) *Gough's Garages, Ltd. v. Pugsley* [1930] 1 K.B. 615 (625).

(95) *Standard Rotary Machine Co.* [1906] 95 L.T. 829; *Wilson v. Kelland* [1901] 2 Ch. 306.

(96) *Ward v. Valletori S. S. Laundry Co.* [1903] 2 Ch. 654.

(97) *Renshaw & Co.* [1908] W.N. 210.

(98) *Appleyard v. New London Omnibus Co.* [1908] 1 Ch. 621.

(99) *N. Defries & Co.* [1904] 1 Ch. 37; *Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627 at p. 630.

(1) *Johnston Foreign Patents Co.* [1904] 2 Ch. 234.

(2) *Gough's Garages Ltd. v. Pugsley*, *supra*.

(3) *Thorn v. City Rice Mills Co.* [1889] 40 Ch. D. 357; *Fowler v. Midland Electric Corporation* [1917] 1 Ch. 656.

(4) *Kuala Pahi Rubber Estate v. Mowbary* [1914] W.N. 321, 111 L.T. 1072.

(5) *Francis v. Gregory Love & Co.* [1916] 1 Ch. 203.

(6) *Fire-proof Doors Ltd.* [1916] 2 Ch. 142; *Prohobd v. Road Rails Ltd.* [1930] C. 782, 57 Cal. 1101, 34 C.W.N. 570.

**632. Duty on amount and stamp :—**Where debentures are redeemable at a sum in excess of the amount advanced, duty is chargeable on the additional amount also (7) ; but where debentures are payable on a fixed date at par and a company merely has the option of redeeming them earlier at a premium, no duty is payable on the premium (8). For stamp see Appendix—"Stamp Duty".

**633. Registration :—**Where a debenture creates a charge on immovable property, even if it be for less than Rs. 100, it requires registration under s. 59 of the Transfer of Property Act IV of 1882, because after amendment of s. 100 of the said Act by Act XX of 1929 the provisions of the aforesaid s. 59 relating to a simple mortgage apply to a charge on immovable property (9).

**634. Appointment of manager in debenture holders' action :—**The Court may appoint a manager in a debenture-holders' action provided the goodwill or business of the company is charged by the debentures expressly or by implication. A charge on all the company's properties and effects whatsoever is sufficient for the purpose (10). But if the company be a statutory one and of a public nature, its undertaking cannot be ordered to be sold (11) ; a sale of such property even with the sanction of the Court is a nullity (12).

In construing a debenture the Court cannot refer to the prospectus pursuant to which the debenture was issued (13).

**635. Power to modify provisions :—**The provision of a power to modify the terms on which debentures are secured bears some analogy to such a power as that conferred by s. 31 which enables a majority of the shareholders by special resolution to alter the articles. These powers conferred on a majority must be exercised subject to a general principle which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, *viz.*, that the power given must be exercised for the purpose of benefiting the class as a whole and not merely individual members only ; subject to this the power may be unrestricted (14).

**636. Date when charge is created :—**The date of the creation of a mortgage or charge by a company is the date when the instrument of mortgage or charge is executed and not the date when it is issued to the incumbrancer (15), or when any money is subsequently advanced on it (16). The registration must be effected within 21 days of such date. If it is not done so, the mortgage or charge is void against the liquidator and the creditors of the company (17).

**637. Parties cannot alter effect of the section :—**The parties to the transaction cannot alter the effect of the section by adopting a form which does not accord with the real transaction, for instance, by executing a deed of assignment

(7) *Rowell v. Commissioner of Inland Revenue* [1897] 2 Q.B. 194.

(8) *Knight's Deep Ltd. v. Commissioner of Inland Revenue* [1900] 1 Q.B. 217.

(9) *Tenneti Viswanadhan v. M. S. Menon* [1939] M. 202, [1939] Mad. 199, [1939] 1 M.L.J. 185 (203).

(10) *Leas Hotel Co.* [1902] 1 Ch. 332.

(11) *Saunders v. Bevan* [1912] 107 L.T. 70 ; *Crystal Palace Co.* [1911] 27 T.L.R. 413, 104, L.T. 898.

(12) *Woking Urban District Council Act* [1914] 1 Ch. 300.

(13) *Tewksbury Gas Co.* [1911] 2 Ch. 279 affirmed on appeal in [1912] 1 Ch. 1.

(14) *Per Lord Haldane in British America Nickel Corporation v. M. I. O'Brien Ltd.* [1927] A.C. 369, 317 ; see also *New York Taxi Cab Co.* [1913] 1 Ch. 1.

(15) *Appleyard v. New London Omnibus Co.* (infra).

(16) *Appleyard v. New London Omnibus Co.* [1908] 1 Ch. 621 ; *Esberger & Son Ltd. v. Capital & Counties Bank* (infra).

(17) *Esberger & Son Ltd. v. Capital & Counties Bank* [1913] 2 Ch. 366 ; *Ladenburgh & Co. v. Goodwin & Co.* [1912] 3 K.B. 275.

instead of a mortgage (18). But where the agreement is for an out and out sale, it does not require registration under this section (19). "It is an old law, and plain law, that in transaction of this sort the Court must consider whether or not the documents really mask the true transaction. If they merely mask the transaction, the Court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction. In *Helby v. Mathews* (20) Lord Herschell states the principle that we have to follow, in the opening sentences of his speech: 'My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement' " (21). A mortgage of substituted property made pursuant to the provisions of a trust deed requires registration (22), unless debentures have been registered under s. 128 *post* (23).

**638. Object of registration :—**The object of registration of charge under this section is to ensure means of notice to those who contemplate giving credit to the company. But where through misapprehension an earlier mortgage was not at first registered, but a later mortgagee who had registered his mortgage and his assignee had notice of the earlier mortgage and also notice of the defect of registration, the equitable doctrine enunciated by Lord Eldon in *Davis v. Earl of Strathmore* (24) that a person who registered a mortgage with notice of a prior unregistered mortgage should not be allowed to obtain priority did not apply and the later mortgagee and his assignee were not precluded from relying on the section (25).

The proper means of obtaining a decision of the Court as to whether registration of the mortgages &c. is necessary, is by a special case (26).

**639. Charge created in favour of officer :—**A charge created by the directors of a company on its assets when the company is still a going concern is not illegal, but a charge created in favour of its officers is void when not registered (27). When a charge specifically affecting property of a company has been granted in favour of an officer of the company, he cannot avail himself of it unless registered in accordance with this section, even though he had ceased to be an officer (28). In the winding up directors will not be allowed to set up against the general creditors a mortgage or charge on the property of the company not registered under this section (29).

**640. Effect of omission to register :—**A mortgagee, even though he be a director, does not lose his security by an omission to see that it is entered on the register of mortgages (30), without concealment, although he does so if the mortgage is one that requires registration under this section and is not registered. The priority of mortgages is not affected by any imperfection of the register kept by the company (31). An officer creating a charge on the property of a company, if it is not registered as required by this section, is void against the official receiver (32).

(18) *Sanderson & Co. v. Clarke* [1913] 29 T.L.R. 579.

(19) *George Inglefield, Ltd.* [1933] 1 Ch. 1.

(20) [1895] A.C. 471.

(21) *George Inglefield Ltd.* (supra) at p. 17.

(22) *Cornbrook Brewery v. Law Debenture Corporation* [1904] 1 Ch. 103.

(23) *Cunard Steamship v. Hopwood* [1908] 2 Ch. 564.

(24) [1801] 16 Ves. 419 at p. 428.

(25) *Monolithic Building Co.* [1915] 1 Ch. 463.

(26) *Cunard Steamship Co. v. Hopwood*, supra.

(27) *Balasubramanya v. Kandaswami* [1916] 32 I.C. 91.

(28) *Krishna v. Nallaperumal* [1919] 47 I.A. 33, 22 Bom. I.R. 568 (P.C.).

(29) *North & South Wales Bank* [1870] L.R. 10 Eq. 515.

(30) *Wright v. Horton* [1887] 12 App. Cas. 371.

(31) *General South American Co* [1876] 2 Ch. D. 337

(32) *Indus Film Corpn.* [1939] S. 100.

It is necessary to file with the Registrar the particulars of a mortgage by deposit of title deeds, whether or not it is accompanied by a memorandum of deposit (33).

An agreement to give security, if expressed so as to create a present equitable right to a security, creates a charge and, if not registered, will be void as against the liquidator and any creditor of the company (34).

In default of a compliance with the provisions of this section as to registration, a mortgage or charge will confer no security on the company's property or undertaking as against the liquidator or any creditor. This principle applies even where a subsequent registered incumbrancer had express notice of the prior mortgage at the time when he took his own security (35). A charge which is not registered under this section is void against all the creditors of a company irrespective of the date on which their debts accrued; and the fact that decrees have been obtained on such unregistered mortgages prior to the winding-up application does not take it out of the operation of this section. Such a decree-holder cannot stand outside the winding up and realize his security, thereby diminishing the assets divisible among the creditors (36). This section does not however avoid absolutely a mortgage not registered with the Registrar of companies, but only so far as any security given thereby on the company's property or undertaking. The effect therefore is that such a mortgage is valid as an admission. The Rangoon High Court has held that such a mortgage cannot be repudiated by the company itself so long as it is a going concern though it is void against the liquidator and the creditors in a winding-up (37). If however the Court extended the time for registration under the provisions of s. 141, and the mortgage was registered within that time, it constituted a valid charge *ab initio*, that is, from the date of execution, subject only to such conditions as were imposed by the Court which had extended the time (38). But see now s. 141.

**641. Cl. (b).—**A power in the articles of association authorizing the directors to mortgage or charge the property of the company does not authorize them to mortgage or charge future calls, or in other words the unpaid capital of the company (39). Where the directors issued debentures on the security of all and singular the capital, stock, moneys, securities, estate and effects of the company, the debentures did not extend to the uncalled capital of the company (40).

**642. Cl. (c). Immovable property :—**The term "immovable property" includes land, benefits to arise out of land, things attached to the earth, or permanently fastened to anything attached to the earth (41). In certain circumstances machinery may be immovable property, if it is so affixed to the soil as to become immovable property (42). Bonus certificates giving debenture-holders additional benefit to be paid out of the sale of lands secured by a trust-deed create charges which require registration (43). For other instances of charge requiring registration see the undernoted cases (44).

(33) *Maneklal v. Saraspur Manufacturing Co.* [1927] B. 167, 29 Bom. L.R. 253. [1906] 2 Ch. 467 at p. 477; *Orleans Motor Co.* [1911] 2 Ch. 41.

(34) *Pegge v. Neath & District Tramways* [1898] 1 Ch. 183; *Jackson & Brasford Ltd.*

(35) *Monolithic Building Co.* [1915] 1 Ch. 643.

(36) *Sathgram Coal* [1936] 40 C.W.N. 1171.

(37) *Aung Ban v. Chettiar Firm* [1927] R. 288, 104 I.C. 326, 5 Rang. 585.

(38) *Ram Narain v. Radha Krishna* [1930] P.C. 66, 57 I.A. 76, [1930] A.I.J. 190.

(39) *See Bank of South Australia v. Abrahams* [1875] L.R. 6 P.C. 562.

(40) *Stanley's case* [1864] 4 De G. J. & S. 407 (414).

(41) S. 3 (26), General Clauses Act X of 1897 as amended by the Adaptation of Laws Order, 1950 in India.

(42) *Maheswari Bros. v. O. L., Indra Sugar Works* [1938] All. 896, [1938] A. 574.

(43) *See Ladenburgh & Co. v. Goodwin & Co. Ltd.* [1912] 3 K.B. 275; *Sanderson & Co. v. Clarke* (infra).

(44) *Columbian Fireproofing Co.* [1910] 2 Ch. 120; *Re David Allister Ltd.* [1922] 2 Ch. 211; *Wrightson v. McArthur & Hutichison's Ltd.* [1921] L.R. 2 K.B. 807.

A company can effect a mortgage on immovable property by deposit of title deeds without complying with the formalities required by its articles upon the execution of mortgage deed (45).

The rule prohibiting the clogging of the equity of redemption under a mortgage by an individual applies equally to a mortgage by a company (46).

**643. Charge on foreign land :—**Under the English law a company can create a charge on its lands situated in a foreign country. "An English debenture", observed Lord Swinfen (then Swinfen Eady J.), "purporting to charge by way of floating security all the English company's property and assets does amount, where the English company possesses land abroad, to an agreement to charge that land, and is a valid equitable security according to English law, and the debenture-holders, upon any winding up of that company, would rank as secured creditors in respect of the foreign land, and upon a winding up in England they would be paid in full out of the proceeds of sale of that land, before any distribution of proceeds of it was made among ordinary unsecured creditors. The law on this point is correctly stated by Sir Francis Palmer in the 5th edition of his Company Law at p. 236 : 'Even without complying with the formalities required by the local law in relation to transfers or mortgages, it is competent to a company, to create an effective charge on property belonging to it in a foreign country, for the Court, in virtue of its Chancery jurisdiction in *personam*, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction [*Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 443 (444) ; *Mercantile Investment &c. Co. v. River Plate &c. Co.* (1892) 2 Ch. 303 ; *Westlake's International Law* (1880) 183] ; and in determining whether there is any equity, *e.g.*, if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it, although the equity may be one not recognized by the *lex loci rei sitæ*'" (47).

**644. Cl. (d). Security of book-debts :—**"Book-debts" means debts arising in a business in which it is the proper and usual course to keep books and which ought to be entered in such books (48). Future book-debts may be charged (49). Where a bill of exchange has actually been entered in the books of the company, it is a book debt (50). As to how a charge may be created in book-debts see the case noted below (51). An assignment of a book-debt as security for the purpose of securing an existing debt constitutes a mortgage of that debt and unless it is registered as required by cl. (d), the assignment will be inoperative as against the liquidator and the creditors of the company (52). But where a letter is an assignment of a part of a book-debt and is not "charge" within the meaning of this section, it does not require registration (53). But a purported assignment of so much of a debt "as may be necessary to indemnify the assignees against an advance" is a charge and as such requires registration under this section, because the Court will look not to the form but the real transaction (54).

(45) *General Provident Assurance Co.* [1872] L.R. 14 Eq. 507.

(46) *Jarrah T. & W. P. Corpn. v. Samuel* [1903] 2 Ch. 1.

(47) *British South African Co. v. De Beers Consolidated Mines* [1901] 1 Ch. 354 (357), followed in *Anchor Line (Henderson Bros.) Ltd.* [1937] Ch. 483.

(48) *Official Receiver v. Tailby* [1886] 18 Q.B.D. 25—per Esher, M. R. at p. 29 ; *Shipley v. Marshall* [1863] 14 C.B. (N.S.) 566.

(49) *Tailby v. Official Receiver* [1888] 13 App. Cas. 523.

(50) *Dawson v. Isle* [1906] 1 Ch. 633.

(51) *Gorringe v. Irwell I. R. Works* [1886] 34 Ch. D. 128.

(52) *Ranjit v. David* [1935] C. 218, 38 C.W.N. 1190, 62 Cal. 1, 155 I.C. 193. See also *Hoare v. British Columbia Development Assn.* [1912] 107 L.T. 602.

(53) *Ashby Warner & Co. v. Simmons* [1936] 52 T.L.R. 613 (C.A.).

(54) *Sanderson & Co. v. Clarke* [1913] 29 T.L.R. 579.

When a company having contracted with the Ministry of Fuel and Power in England for the supply of logs, applied for and obtained facilities for a considerable overdraft from its bank on the terms of sending a letter to the Ministry directing them to pay all moneys payable to the company under the contract into the bank to the company's account, such directions not to be revoked without the consent of the bank in writing, and the company subsequently went into voluntary liquidation, it was held that the letter was an *assignment of book debts* to the bank by way of security for the overdraft and as it had not been registered, the charge was void against the liquidator in the winding up (55).

Assignment of present and future book-debts of a company by way of security to the guarantor of its overdraft at a bank is within the provisions of this clause (56).

**645. Cl. (e). Construction :**—On a proper construction of the corresponding clause of s. 109 of the previous Act a pledge on movable property or a mortgage on charge on stock-in-trade did not require registration under that section. A comma should be read after the word "pledge" in that clause (57). But this decision of the Bombay High Court has been dissented from recently by the Madras High Court in *Rajah of Vizianagram v. O. L. Vizianagram Mining Co.* (58) where it has been held that what that clause contemplated was that where there was a mortgage or charge on the stock-in-trade of a company which was movable property, such mortgage or charge required registration; but what was exempted from registration was a pledge of movable property other than the stock-in-trade. Where a company is incorporated for mining purposes, the mineral ore would come within the meaning of stock-in-trade (58).

**646. Movable property**—Hypothecation of movable property is valid (59). "There is nothing (in the Contract Act) to prevent a person from hypothecating his goods to another person for security" (60).

**647. Pledge** :—There are three kinds of security : the first a simple lien ; the second, a mortgage passing the property out and out ; the third, a security intermediate between a lien and a mortgage—*viz.*, a pledge—where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true, the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest" (61); See *Rudhakrishnan v. O. L., Madras Peoples' Bank* (62) where it has been held that the difference between mortgage and a pledge of goods is that in a mortgage the ownership of the goods passes, whereas in a pledge the pledgee gets possession but no right to the goods beyond what is necessary to secure the debt. Where a bank indorses to its creditor as security promissory notes drawn in its favour by its debtors and delivers them to the creditor entitling him to realize the securities as and how he pleased, the transaction though it may amount to a mortgage also amounts to a pledge and therefore does not require registration; for this clause clearly contemplates that there can be a mortgage which is also a pledge (62). The pledge of some goods lying at the customs house and the

(55) *Kent & Sussex Saw Mills, Ltd.* [1947] 1 Ch 177, 176 L.T. 167.

(56) *Illingworth v. Houldsworth* [1904] A.C. 355.

(57) *East Africa Hardware Co.* [1949] B. 262, 51 Bom L.R. 271.

(58) [1952] M. 136.

(59) *Shish Chandra v. Mungri Bewa* [1904] 9 C.W.N. 14.

(60) *Haripada v. Anath* [1918] 22 C.W.N. 758 per Fletcher J. at p. 759.

(61) *Halliday v. Holgate* [1868] 3 Ex. 299 (302), 18 L.T. 656.

(62) [1943] M. 73, [1942] M.W.N. 692, 55 M.L.W. 709.

handing over of the delivery warrant as security for a debt however constitute a charge requiring registration (63).

The object of the words "not being a pledge" in this clause is to provide that registration should not be necessary where the person entitled to the security has obtained possession of the goods (62).

The element of possession which is contemplated by a deed of pledge and which is actually given, is an important factor which stands in the way of the document being regarded as creating a purely equitable charge of the character of a floating charge requiring registration, though the creditor may be allowed to run the company's business as an agent under an irrevocable power of attorney (64).

A pledge of securities gives a power of sale on default of payment on the due date or, if no date of payment is fixed, after notice (65).

**648. Cl. (f). Floating charge :—**A floating charge would necessarily require registration under this clause (66). A floating charge is not a specific security ; it is only one which affects the assets included in it, which are mortgaged in such a way that the mortgagor can deal with them without concurrence of the mortgagee (67). In the last cited case the elements of possession, which was actually given, stood in the way of the document being regarded as a floating charge ; therefore this clause did not apply and the document did not require registration as a floating charge. As to the nature of a floating charge, see Notes 617 and 621, *supra*.

**649. Undertaking :—**The word "undertaking" means all the property, present or future, of a company, and a charge thereon is effective and operates by way of floating security (68). Where the objects of a company comprised the carrying on of three distinct businesses, supplemental to one another, the Court refused, at the instance of decree-holders having a floating charge on the whole undertaking to restrain the sale of one business (69).

The mortgage of the property and undertaking of a company to secure debenture-holders or mortgagees in an equivalent position does not prevent the company from making a valid charge on a specific asset as a security for an advance of money necessary for carrying on the business (70).

**650. Charge void :—**This section makes the security void not against everybody, but as against "the liquidator and any creditor of the company." It leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company (71). In spite of the generality of the expression "any creditor," an ordinary unsecured creditor of the company cannot avoid the mortgage, for he has no enforceable right either against the mortgagee or against the property comprised in the mortgage. Only a creditor who has acquired a right against the property may interfere and avoid the mortgage, *e.g.*, when he has a charge over the property or when the company is in liquidation and the unsecured creditor has acquired a right to the rateable distribution of the assets of the company (71).

It is important to notice the distinction that what avoids the charge is not the lack of registration under this section, but the neglect to send in particulars. The validity of the charge does not depend on the date on which the Registrar chooses to

(63) *Dublin City Distillery, Ltd. v. Doherty* [1914] A.C. 823.

(64) *Karundia v. O. L. Andhra Paper Mills Co.* [1949] 2 M.L.J. 66, 62 M.L.W. 484.

(65) *Deverges v. Sandeman, Clark & Co.* [1902] 1 Ch. 579 at p. 593.

(66) *Raja of Vizianagram v. O. L. Vizianagram Mining Co.* [1952] M. 136.

(67) *Tansukhray v. O. L. Andhra Paper Mills Co.* [1952] M. 595.

(68) *Leicester v. Yolland & Co. Ltd.* [1908] 1 Ch. 152.

(69) *H. H. Vivian & Co.* [1900] 2 Ch. 654.

(70) *Exp. Pitman* [1879] 12 Ch. D. 707.

(71) *Chandbali River Service Co.* [1956] 60 C.W.N. 278

make the necessary entry in the register. Where the particulars of the charge are submitted within 21 days from the date of execution of the charge, the mere fact that the registration was allowed to stand over for a period of two years owing to some outstanding dispute about the fees would not destroy the security (72).

The provisions of this section are designed as a protection to the public. Hence the matter of registration of the charge should not be allowed to be delayed for an unduly long time (72).

**651. Misapplication of money borrowed :—**Where a company has a general borrowing power, a lender is not bound to enquire into the purposes for which the money is intended to be applied, and a misapplication of it by the company will not invalidate his security, provided that the lender was not aware at the time of the loan of the intended misapplication (73).

**652. Borrowing :—**A trading company (74) or a banking company (75) has an implied power to borrow money, but not any other company (76). The exigencies of commerce renders it absolutely essential that the members of a trading company should have power to borrow money on its credit and by mortgaging its assets. They can bind the company by endorsing bills and notes to bankers and money-lenders for the purpose of raising funds for carrying on the business. In such a case the directors have power to bind the company by the issue of reasonable securities in the ordinary course of business (77). The articles of a company contained no provisions as to the issue of negotiable instruments, but its objects were such that a power to issue them was implied. The directors gave to H for value an instrument under the seal of the company headed "debenture": held that the endorsee and transferee for value of this instrument was entitled to prove on it against the company free from equities between H and the company (78). Where the deed of settlement of an insurance company contained no express power of borrowing it was held that the directors acted within their powers in borrowing money from the bankers of the company to meet pressing demands and charging the proceeds of a call already made but not immediately payable (79). There is a distinction between loans which a company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on its affairs, the company or its agents on its behalf have contracted. Where the articles authorized the directors to borrow on bonds, mortgage or other securities or otherwise to a certain limit, with the sanction of the shareholders, the power justified a mortgage the object of which was in part to cover previously incurred liabilities, provided the principal amount of the loan did not exceed the limit fixed in the power (80). Where the limit of borrowing prescribed by the rules of a society had been exceeded, the society which had derived no benefit, was not liable for such loan, and the directors upon whose authority the loans were taken were personally liable to the lender for the money, although there was no fraud on the part of the directors (81). But when the directors lend money in excess of the borrowing powers conferred on them by the articles and all the monies are in fact utilized by the company, it is liable to pay the amount; if it is

(72) *Benares Bank v. Bank of Behar* [1947] A. 117 relying on *National P. U. Bank v. Charnley* [1924] 1 K.B. 431.

(73) *David Payne & Co.* [1904] 2 Ch. 608.

(74) *Jackson v. Rainford Coal Co* [1896] 2 Ch. 340; *Exp. Pitman* (supra).

(75) *Bank of Australia v. Breillat* [1847] 6 Moo. P.C.C. 152, 195.

(76) *Blackburn B. B. Society v. Cunliffe, Brooks & Co.* [1882] 22 Ch. D. 61.

(77) *Spence's Hotel Co.* [1867] 1 B.L.R. (O.C.) 14.

(78) *Exp. City Bank* [1868] 3 Ch. App. 758.

(79) *International Life Assurance Society* [1870] L.R. 10 Eq. 312.

(80) *Kernot v. Walton* [1882] 9 Cal. 14.

(81) *Chaples v. Brunswick P. B. Society* [1881] 6 Q.B.D. 696.



not so utilized the company is not liable (82). In such a case it may however be impliedly ratified and sanctioned by the shareholders at general meetings—the passing of accounts and declaration of dividends constituting sanction and ratification (83). But it is apprehended that no such ratification is possible without actual knowledge of the transaction.

**653. Borrowing powers of a company :—**If the memorandum of association gives limited power to borrow and mortgage, the limit cannot be exceeded (84). But if the loan is unauthorized, the lender may stand in the shoes of a previous lender whose money has been paid off by the money of the former (85). The directors may be personally liable if they represented that they had authority to issue the debenture where they had not (86). Where one of the clauses of the memorandum of a bank set out that among the objects for which the bank was established was “to raise money by the issue of shares (preference, ordinary or deferred), debentures, debenture-stock, bond and other securities, and to invest the moneys so raised, or any part thereof, upon any of the investments specified in this memorandum,” it was held by Mr. Justice Costello that the bank was empowered to raise money by the issue of debentures and that if they so desired to invest the money they raised or any part of it (87).

If the borrowing is beyond the powers of the company, the loan as well as all securities of it are void. But if the loan is merely beyond the powers of the directors it may be rendered valid by acquiescence or ratification by the company (88). Where an association having no borrowing power received money by way of loan or advance, the following propositions were laid down by Buckley J.: “(1) If the result of the transaction was that indebtedness was not increased because the new loan was applied in discharging an old debt, then it was not to be regarded as a borrowing transaction, for the invalid lender could be regarded as standing in the place of those whose debt had been paid off; (2) the same doctrine was applicable even when the loan was applied in discharging not an old debt but a future debt [*Baroness of Wendock v. River Dee Co.* (1887) 19 Q.B.D. 155]; (3) if the lender could identify his money or the investment of his money in the hand of the borrower, he could call for its return. In such a case he was entitled to what was commonly called a tracing judgment; but (4) if the lender could not bring himself within any of the above propositions, then he was a person who was unable as against the borrower to affirm that he held a debt, either legal or equitable. Neither in a Court of law nor in a Court of Equity could he affirm that he was a creditor or entitled to such a right or claim as would support a winding up petition” (89). On appeal from this case the House of Lords held (1) that the power to borrow must be limited to borrowing for the proper objects of the society, and that the carrying on the banking business was *ultra vires*; (2) that the depositors were not entitled to recover money paid by them on an *ultra vires* contract of loan on the footing of money had and received by the society to their use; (3) that the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the depositors could follow, as having been invalidly borrowed, and in part moneys which the society could follow, as having been wrongfully employed by its agents in the banking busi-

(82) *Cine Industries & Recording Co.* [1942] B. 231, 41 Bom. L.R. 381, 203 I.C. 116.

(83) *National Bank of India v. Delhi Cotton Mills Co.* 105 P.L.R. 1902, 57 P.R. 1902.

(84) *Wenlock v. River Dee Co.* [1885] 10 App. Cas. 354; *Howard v. Patent Ivory Manufacturing Co.* [1888] 38 Ch. D. 156.

(85) *Neath Building Society v. Luce* [1889] 43 Ch. D. 158.

(86) *Firbank's Executors v. Humphreys* [1889] 18 Q.B.D. 51.

(87) *Imperial Bank v. Bengal National Bank* [1930] C. 536 (537), 57 Cal. 328, 127 I.C. 760.

(88) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366.

(89) *Birkbeck P. B. Building Society* [1912] 2 Ch. 183 (C.A.).

ness and (subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset and to the costs of liquidation) ought to be distributed *pari passu* between the depositors and the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding up (90).

Where there were no special articles of association, it was held that a special resolution empowering directors to borrow on debentures any sum not exceeding a certain amount was a sufficient authority for the borrowing (91). A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed works for the company (92).

If a company has the power to borrow, or to invest its funds in any manner it likes, the remedy of a shareholder for an abuse of the power lies within the four corners of this Act and not by having resort to a suit for declaration and injunction. The question of the soundness of the investment or excessive borrowing by the directors is a matter which concerns the indoor management of the company and cannot be examined by a Civil Court in a regular suit (93).

**654. Certificate conclusive:**—The certificate of the Registrar is conclusive evidence that all the requirements of the section as to registration have been complied with (94).

**655.** By s. 142, *post* heavy penalties have been provided for omission by a company to register the particulars with the Registrar as required by the section (95).

**Cls. (g), (h) and (i) of sub-s. (4)** are new.

**Sub. (1). Prescribed particulars:**—See Rule 6 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**Form:**—For the form of particulars of charge under this section, see Form No. 8 in Annexure 'A' *ibid*.

**126. Date of notice of charge.**—Where any charge on any property of a company required to be registered under section 125 has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the charge as from the date of such registration.

This section corresponds to sub-s. (2) of s. 109 of the previous Act—*Notes on Clauses*.

See notes to s. 125.

**127. Registration of charges on properties acquired subject to charge.**—(1) Where a company acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed

(90) *Sinclair v. Brougham* [1914] A.C. 398.

(91) *Bryon v. Metropolitan S. Omnibus Co.* [1858] 3 De G. & J. 123.

(92) *Gardner v. London & C. Ry. Co.* [1867] 2 Ch. App. 201.

(93) *Shiva Ram v. Punjab Textile Mills* [1949] 50 P.L.R. 282.

(94) *Leicester v. Yolland & C. Ltd.* [1908] 1 Ch. 152.

(95) See *M. I. G. Trust Ltd.* [1933] 1 Ch. 542 (C.A.).

manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar for registration in the manner required by this Act within twenty-one days after the date on which the acquisition is completed :

Provided that, if the property is situate, and the charge was created, outside India, twenty-one days after the date on which a copy of the instrument could, in due course of post and if despatched with due diligence, have been received in India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the Registrar.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

This section corresponds to s. 109A of the previous Act and s. 97 of the English Act of 1948—*Notes on Clauses*.

**Sub-s. (1). Copy certified in the prescribed manner:**—As to the verification of the copy, see Rule 6 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

For the form of particulars of charge under this section see Form No. 9 in Annexure 'A' *ibid*.

**128. Particulars in case of series of debentures entitling holders *pari passu*.**—Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall, for the purposes of section 125, be sufficient, if there are filed with the Registrar, within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) the total amount secured by the whole series ;
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined ;
- (c) a general description of the property charged ; and
- (d) the names of the trustees, if any, for the debenture holders ;

together with the deed containing the charge, or a copy of the deed verified in the prescribed manner, or if there is no such deed, one of the debentures of the series :

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the Registrar, for entry in the register, particulars of the date and amount of each issue ; but an omission to do this shall not affect the validity of the debentures issued.

This section corresponds to s. 110 of the previous Act and s. 95 (8) of the English Act of 1948—*Notes on Clauses*.

**656. Application :—**This section provides for an alternative mode of registration (96), and it is applicable both to debentures and debenture stock (97).

**657. Issuing of debentures :—**The directors have power to issue further debentures of the series after the issue of the writ in an action by debenture-holders but before the appointment of a receiver (98). As to what constitutes the issuing of debentures made payable to bearer, see the case noted below (99).

**658. Protection of debentures :—**The registration of a series of debentures protects not only debentures of that series properly issued, but also documents purporting to be debentures of that series which owing to some technical defect can only be upheld as agreements for those debentures, and it is not necessary to register these agreements separately (1).

**659. Debentures ranking *pari passu* :—**As a general rule debenture-holders of the same series are made to rank *pari passu inter se*. If such a debenture-holder gets judgment, it ensures for the benefit of all the debenture-holders (2). If he obtains a collateral security, he holds it as a trustee for all.

Where debentures are issued creating a charge, it is usual to declare expressly that the charges created by all the debentures of the series are to rank equally and without priority of one over another. If it is not so declared each debenture creates a charge ranking in priority to all others issued subsequently, but postponed to all issued before it (3).

If there is a series entitled in one event to rank *pari passu*, but not in another event, and the Registrar registers it under this section and certifies it as a series entitled *pari passu*, that will not make the series rank *pari passu* (4). But this certificate will be conclusive under s. 132 that the requirements of the section as to registration have been complied with (4). The certificate is also conclusive although some required particulars have not been given to the Registrar or entered on the register (5).

As to the verification of a copy of the instrument of charge, see Rule 6 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

For the form of particulars of a series of debentures under this section and s. 129, see Form No. 10 in Annexure 'A', *ibid*.

For the form of particulars of any issue of debentures in a series under Proviso to this section, see Form No. 11 *ibid*.

See notes to s. 125.

(96) Harrogate Estates [1903] 1 Ch. 498

(97) Cunard Steamship Co. v. Hopwood [1908] 2 Ch. 564.

(98) Re Hubbard & Co. [1898] 79 L.T. 665.

(99) Mowatt v. Castle Steel Co. [1886] 31 Ch. D. 58.

(1) Fireproof Doors Ltd. [1916] 2 Ch. 142

(2) Bowen v. Brecon Ry. Co. [1867] L.R. 3 Eq. 541.

(3) Lister v. H. Lister & Sons [1893] 68 L.T. 826, 9 T.L.R. 296.

(4) Yolland & Birkett Ltd. [1908] 1 Ch. 152.

(5) Cunard Steamship Co. v. Hopwood [1908] 2 Ch. 564, 578; National P & U. Bank v. Charnley [1923] W.N. 315, [1924] 1 K.B. 431.

**129. Particulars in case of commission etc., on debentures.**—Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 125 and 128 shall include particulars as to the amount or rate per cent of the commission, discount or allowance so paid or made ; but an omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not, for the purposes of this section, be treated as the issue of the debentures at a discount.

This section corresponds to s. 111 of the previous Act and s. 95 (g) of the English Act of 1948—*Notes on Clauses.*

See notes to s. 128 for the form of particulars of series of debentures, as well as other matters.

**130. Register of charges to be kept by Registrar.**—(1) The Registrar shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Part, and shall, on payment of the prescribed fee, enter in the register, with respect to every such charge, the following particulars :—

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in sections 128 and 129 ;

(b) in the case of any other charge—

(i) if the charge is a charge created by the company, the date of its creation ; and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property ;

(ii) the amount secured by the charge ;

(iii) short particulars of the property charged ; and

(iv) the persons entitled to the charge.

(2) After making the entry required by sub-section (1), the Registrar shall return the instrument, if any, or the verified copy thereof, as the case may be, filed in accordance with the provisions of this Part, to the person filing the same.

(3) The register kept in pursuance of this section shall be

open to inspection by any person on payment of a fee of one rupee for each inspection.

This section corresponds to s. 112 of the previous Act and s. 98 of the English Act of 1948—*Notes on Clauses*.

660. Where the directors advanced money to the company, took as security a debenture giving a general charge on the undertaking, and the debenture was registered, but the register contained no description of any property as charged, it was held that the debenture was not valid as against the creditors of the company (6).

For the form of register of charges to be kept by the Registrar under this section see Form No. 13 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**131. Index to register of charges.**—The Registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the charges registered with him in pursuance of this Part.

This section corresponds to s. 113 of the previous Act.

For the form of Chronological Index of Charges under this section, see Form No. 12 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**132. Certificate of registration.**—The Registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part, stating the amount thereby secured; and the certificate shall be conclusive evidence that the requirements of this Part as to registration have been complied with.

This section corresponds to s. 114 of the previous Act and s. 98 (2) of the English Act of 1948—*Notes on Clauses*.

**661. Certificate conclusive :**—Where the certificate identified the instrument of charge and stated that the mortgage or charge thereby created had been duly registered, it must be understood as certifying the due registration of all the charges created by the instrument, including that of chattels, and it is conclusive evidence of the due registration of the chattels, none the less, because the register in omitting to mention them is not merely defective but misleading (7).

Once a certificate of registration is granted under this section it is no longer open to challenge any of the mechanical slips of registration including the delivery of particulars or the payment of the prescribed fees (8).

If after the issue of debentures a certificate of registration is obtained under this section, nothing done subsequently by way of alteration by the Registrar of his own accord affects the validity of the documents as between the company and the debenture-holder (9).

For other cases see notes to s. 128.

(6) *Native Iron Ore Co.* [1876] 2 Ch. D. 345.

(7) *National P. & U. Bank v. Charnley*, *supra*.

(8) *Benares Bank v. Bank of Behar* [1947] A. 117; see also *In re Yolland & Birkett Ltd.* [1908] 1 Ch. 152.

(9) *Imperial Bank v. Bengal National Bank* [1930] C. 536, 57 Cal. 328, 127 I.C. 760.

**133. Endorsement of certificate of registration on debenture or certificate of debenture stock.**—(1) The company shall cause a copy of every certificate of registration given under section 132, to be endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the charge so registered :

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any charge so given to be endorsed on any debenture or certificate of debenture stock issued by the company before the charge was created.

(2) If any person knowingly delivers, or wilfully authorises or permits the delivery of, any debenture or certificate of debenture stock which, under the provisions of sub-section (1), is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be punishable with fine which may extend to one thousand rupees.

This section corresponds to s. 115 of the previous Act and s. 99 of the English Act of 1948—*Notes on Clauses*.

**134. Duty of company as regards registration and right of interested party.**—(1) It shall be the duty of a company to file with the Registrar for registration the particulars of every charge created by the company, and of every issue of debentures of a series, requiring registration under this Part; but registration of any such charge may also be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration.

This section corresponds to s. 116 of the previous Act and s. 96 of the English Act of 1948—*Notes on Clauses*.

**135. Provisions of Part to apply to modification of charges.**—Whenever the terms or conditions, or the extent or operation, of any charge registered under this Part are or is modified, it shall be the duty of the company to send to the Registrar the particulars of such modification, and the provisions of this Part as to registration of a charge shall apply to such modification of the charge.

This section corresponds to sub-s. (3) of s. 116 of the previous Act—*Notes on Clauses*.

**Forms** :—For the forms of (1) register of charges and memorandum of satisfaction and (2) particulars of modification of charge under this section, see Forms Nos. 13 and 14 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**136. Copy of instrument creating charge to be kept by company at registered office.**—Every company shall cause a copy of every instrument creating any charge requiring registration under this Part to be kept at the registered office of the company :

Provided that, in the case of a series of uniform debentures, a copy of one debenture of the series shall be sufficient.

This section corresponds to s. 117 of the previous Act and s. 103 of the English Act of 1948—*Notes on Clauses*.

**137. Entry in register of charges of appointment of receiver or manager.**—(1) If any person obtains an order for the appointment of a receiver of, or of a person to manage, the property of a company, or if any person appoints such receiver or person under any powers contained in any instrument, he shall, within fifteen days from the date of the passing of the order or of the making of the appointment under the said powers, give notice of the fact to the Registrar; and the Registrar shall, on payment of the prescribed fee, enter the fact in the register of charges.

(2) Where any person so appointed under the powers contained in any instrument ceases to act as such, he shall, on so ceasing, give to the Registrar notice to that effect; and the Registrar shall enter the notice in the register of charges.

(3) If any person makes default in complying with the requirements of sub-section (1) or (2), he shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section corresponds to s. 118 of the previous Act and s. 102 of the English Act of 1948—*Notes on Clauses*

The Joint Committee have made some alterations in this section with the following observation: "The use of the expression 'manager' in a different sense from that in which it has been defined in clause 2 is undesirable; and the Committee have made suitable changes in the wording of this clause" (*vide* J. C. R., para 61).

**662. Appointment of receiver** :—A receiver will be appointed if the company's business is practically at an end and the only asset remaining is a reserve fund



created out of profits earned at an earlier date (10), or if the business is about to be shut down (11). A receiver or receiver and manager will also be appointed by the Court where the principal (12) or interest (13) is in arrear. The consent of the company would not entitle the Court to assume management of a railway company; therefore receivers of the tolls and profits only were appointed at the suit of the debenture-holders (14). When a receiver has been appointed and any application to the Court becomes necessary, it should be made by the person who has appointed or procured the appointment of the receiver (15).

**663. Receiver's position** :—Whether a receiver is agent of the company or of the debenture-holders depends upon the terms of his appointment and the terms of the debenture (16). In the last cited case it was held that there in giving an undertaking to pay a creditor the receivers for a debenture-holder acted as agents of the company and did not warrant that they were agents of the debenture-holder authorized to make him personally liable. A receiver who has been appointed under the terms of a mortgage debenture issued by a company is the agent of the company and not of the debenture-holders; and in the absence of a notice of a claim against the company, he is under no personal liability to refund moneys which he has paid into a receivership account (17). Where after the appointment of a receiver by the debenture-holder in exercise of the power conferred by the debenture the company goes into liquidation, the receiver is entitled to enforce the right to obtain renewal of a lease notwithstanding the liquidation (18). "It is perfectly true (and it has been laid down over and over again)", observed Romer L. J., "that where, as happened in this case, the debenture or trust deed securing the debentures contains the usual clause that the receiver appointed under the deed shall be deemed to be the agent of the company, that the winding-up of the company or the compulsory liquidation of the company puts an end to the agency. But it does not put an end in any way to the powers of the receiver. In my opinion when this liquidation order was made, the right of the receiver to proceed in the name of the company in the Company Court was in no wise affected" (19). But see the case noted below (20) where it has been held that a receiver and manager, although appointed by Court and for the benefit of the debenture-holders, is not the agent to contract, either of the Court or of anybody else, but is a principal.

In England while a company was in compulsory winding up leave was granted under the Court's (Emergency Powers) Act, 1939 to appoint a receiver of the company's property charged by a certain legal charge, debentures and further charges mentioned in the order. A receiver was accordingly appointed, subject to the powers and provisions in the conditions endorsed on the debentures one of which provided that the receiver should be the agent of the company. Another condition empowered the receiver to sell or concur in selling any of the property charged: *Held*, (1) the order empowering the debenture-holders to appoint a receiver according to the tenor of the documents was that he was to be the agent of the company notwithstanding the fact that the company was in liquidation; (2) the receiver could sell the mortgaged property without any further leave of the Court; (3) had it not

(10) *Tilt Cove Copper Co.* [1913] 2 Ch. 588.

(11) *Branstien v. Marjolaine Ltd.* [1914] W.N. 335.

(12) *Hopkins v. Worcester B. C. Proprietors* [1868] L.R. 6 Eq. 437.

(13) *Bissil v. Bradford Tramways Co.* [1891] W.N. 51.

(14) *Gardner v. London C. D. Ry.* [1867] 15 L.T. 552.

(15) *Parker v. Dunn* [1845] 8 Beav. 491; *Windschuegl v. Irish Polishes Ltd.* [1941] 1 I.R. 33.

(16) *Central London Electricity, Ltd. v. Berners* [1945] 1 All E.R. 160.

(17) *Bissel v. Aeriel Motors* [1910] 27 T.L.R. 73.

(18) *Gough's Garages Ltd. v. Pugsley* [1930] 1 K.B. 615.

(19) *Ibid* at p. 626.

(20) *Glasdir Copper Mines* [1906] 1 Ch. 365.

been for the Court's order mentioned above and the particular circumstances in which it was made, the receiver would not have become the agent of the company (21).

**664. His powers** :—As to a receiver's powers to make contracts and his personal liability in this respect, see *Moss Steamship Co. v. Whinney* (22). A receiver and manager, when duly appointed by the lender under the terms of a debenture, has an implied power to sue in the company's name for the purpose of getting in any property charged or for rescission of a contract or alternately for specific performance (23). Where advances for the preservation of a company's assets are made to a receiver and manager by a party to a debenture-holder's action under an order of Court which directs that the sum advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver and manager is nevertheless entitled to take his costs and expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realized by the receiver and manager for the benefit of all concerned (20). A receiver appointed by Court is still the agent of the company and an application by him to sell the company's property is not necessary (24).

**665. His liability** :—A receiver appointed by the trustees of debenture-holders under the trust deed and carrying on the company's business in its name is a mere agent and in doing so he does not incur any personal liability (25). As to the right of a person to set off his claim against the claim of the assignee from a receiver see the case noted below (26). The receiver will not be personally liable for loans made in pursuance of leave given to him by the Court to borrow money, unless he has taken that liability upon himself by the terms of the loan (27). Where a receiver has not applied to the Court for leave to employ an agent, the latter is not entitled to any commission; but the Court has a discretion to award him such compensation for his efforts as the Court considers just in the circumstances of the particular case (28). The fact that the acts complained of amount to misappropriation rather than waste makes no difference for the purpose of O. 41, r. 1, C. P. Code as to the liability of a receiver (29).

**666. Jurisdiction to appoint receiver** :—The Court has no jurisdiction to appoint a receiver except in a debenture-holder's action. If it is necessary to protect the assets, other means must be sought which are provided in the Companies Act (30). It has however been held in a recent case that it is not possible to endorse the view that in no case under the Companies Act except in a debenture-holder's action can a receiver be appointed to take up the company's business and its management pending the decision of the Court in that litigation. Several cases can be visualized when a company Judge may exercise such a power under the provisions of O. 40, r. 1 C. P. Code or *ex debito justitiæ* (31). It cannot be said that the Court has no jurisdiction to appoint a receiver in a going concern like a company which is carrying on the managing agency business of another company. There is no provision in this Act which excludes the jurisdiction, though since the Act makes provision for dealing with circumstances in which a company is mismanaged,

(21) *Northern Garage* [1946] 115 L.J. Ch. 204.

(22) [1912] A.C. 254.

(23) *M. Wheeler & Co. v. Warren* [1928] Ch. 810.

(24) See *In re Wood's Application* [1941] 110 L.J. (Ch.) 73.

(25) *Owen & Co. v. Cronk* [1895] 1 Q.B. 265.

(26) *Parsons v. Sovereign Bank of Canada* [1913] A.C. 160.

(27) *Hoffman v. A. Boynton Ltd.* [1910] 1 Ch. 519.

(28) *National Flying Service Ltd.* [1936] 1 Ch. 271.

(29) *Hanumanayya v. Venkata* [1894] 18 Mad. 23.

(30) *Kailash v. Sadar Munsiff of Silchar* [1925] C. 817, 52 Cal. 513.

(31) *Ratan Lal v. Jagadhri Light Ry. Co.* [1946] L. 193, 48 P.I.R. 1.

it should not be necessary in a vast majority of cases to appoint a receiver (32). It may not be proper to appoint a receiver in cases where the managing agency agreement shows that the appointment was due to a peculiar confidence reposed in the managing agents. But when a receiver is appointed, he is not substituted for the company. He is only the manager of that company and as such would be entitled to perform all the duties of that company including the managing agency of the other company. His powers will of course be contemporaneous with the purposes of the company of which he is appointed receiver (32).

The Court ought not to interfere with the right of the debenture-holders to appoint a receiver under the deed (33). In the last cited case leave was given to the receiver to take possession notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the power of the receiver other than the power to take possession and to sell the properties.

Where a mortgagee appointed a receiver of the income of the mortgaged property, an injunction was granted by the Court to restrain the mortgagor from interfering with the receiver, or receiving the rent (34). "There is no question", observed Sir John Romilly, M. R. "but that this Court will not permit a receiver, appointed by its authority and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive by any one, although the order appointing him may be perfectly erroneous; this Court requires and insists that application should be made to the Court for permission to take possession of any property of which the receiver either has taken or is directed to take possession and it is an idle distinction, that this rule only applied to property actually in the hands of a receiver. If a receiver be appointed to receive debts, rents or tolls, the rule applies equally to all these cases, and no person will be permitted, without the sanction or authority of the Court, to intercept or prevent payment to the receiver of the debts, rents or the tolls, which he has not actually received but which he has been appointed to receive" (35).

**667. Power is fiduciary** :—If the debentures confer on a named debenture-holder the power to appoint a receiver of the property charged, the power is fiduciary and must be exercised for the benefit of the debenture-holders generally (36). Such an appointment does not oust the jurisdiction of the Court to appoint a receiver (37). On the other hand a winding-up by the Court does not take away the right of the debenture-holders to have a receiver, but in the absence of special circumstances the official liquidator should be appointed receiver to avoid expense and conflict (38).

**668. Court's officer** :—A receiver appointed by the Court is its officer and any interference with his possession is a contempt of Court (39). He may be discharged if his appointment has been produced by means of a misleading affidavit (40).

**669. When action for receiver may be commenced** :—The action for a receiver may be commenced before there is any default, and if default occurs before the hearing, the appointment may be made (41). A receiver may be appointed even

(32) *Sivaprakasa v. Samarapuri* [1949] 2 M.L.J. 382, 1949 M.W.N. 587, 52 M.L.W. 584.

(33) *Henry Pound, Son & Hutchins* [1889] 42 Ch. D. 402 (C.A.).

(34) *Bally v. Went* [1884] 51 L.T. 764.

(35) *Ames v. Trustees of Birkendead Docks* [1855] 20 Beav. 332 at p. 353.

(36) *Maskelyne British Typewriter Co.* [1898] 1 Ch. 133.

(37) *Slogger Automatic Feeder Co.* [1915] 1 Ch. 478.

(38) *Buckley* 11th ed. pp. 18, 410 and 411 and the cases cited there.

(39) *Searle v. Choat* [1884] 25 Ch. D. 723.

(40) *Church Press Ltd.* [1917] 116 L.T. 247.

(41) *Carshalton Park Estates* [1908] 2 Ch. 62.

before the principal or interest is in arrear if the assets are in danger (42), or a sale will be necessary in the near future (43) or in a case of "jeopardy" (44).

**670. Contempt of Court :—**The publication of injurious misrepresentations concerning parties to proceedings, such as a receiver in a debenture-holder's action in relation to those proceedings, may amount to contempt of Court, because it may cause those parties to discontinue or to compromise the proceedings and because it may deter persons with good causes of action from coming to Court, and is thus likely to affect the cause of justice (45). A libel on the business carried on by a receiver and manager appointed by the Court is a contempt of Court any may be punished by committal of the offender (46). Comment on the report of the official receiver in bankruptcy before it has been read to the Court may amount to contempt of Court (47).

**Forms :—**For the forms of (1) register of charges and memorandum of satisfaction, (2) notice of appointment of receiver or manager, and (3) notice to be given by receiver or manager on ceasing to act as such, pursuant to this section, see Forms Nos. 13, 15 and 16 respectively in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**138. Company to report satisfaction and procedure thereafter.—**(1) The company shall give intimation to the Registrar of the payment or satisfaction, in whole or in part, of any charge relating to the company and requiring registration under this Part, within twenty-one days from the date of such payment or satisfaction.

(2) The Registrar shall, on receipt of such intimation, cause a notice to be sent to the holder of the charge calling upon him to show cause within a time (not exceeding fourteen days) specified in such notice, why payment or satisfaction should not be recorded as intimated to the Registrar.

(3) If no cause is shown, the Registrar shall order that a memorandum of satisfaction in whole or in part, as the case may be, shall be entered in the register of charges.

(4) If cause is shown, the Registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

(5) Nothing in this section shall be deemed to affect the power of the Registrar to make an entry in the register of charges under section 139 otherwise than on receipt of an intimation from the company.

(42) *Wissner v. Levison & Streiner* [1900] W.N. 152.

(43) *Smith v. Wilkinson* [1897] 1 Ch. 158.

(44) *London Pressed Hinge Co* [1905] 1 Ch. 576.

(45) *William Thomas Shipping Co.* [1936] 2 Ch. 368.

(46) *Helmore v. Smith* [1886] 35 Ch. D. 449.

(47) *Re Hooley* [1899] 79 I.T. 706.

This section corresponds to s. 121 of the previous Act. It was originally cl. 132 of the Bill. The Joint Committee have made alterations in this section with the following remark: "New clause 139 makes the provision in sub-clause (5) of the original clause 132 applicable with the case dealt within clause 132 and also to that dealt with in original clause 133. This is clearly necessary. Sub-clause (5) of the original clause 132 has been omitted and sub-clause (6) of the clause re-numbered as sub-clause" (5) (*vide* J.C.R., para 62).

See the next section.

**Form** :—For the form of memorandum of complete satisfaction of charge pursuant to this section see Form No. 17 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**139. Power of Registrar to make entries of satisfaction and release in absence of intimation from company.**—The Registrar may, on evidence being given to his satisfaction with respect to any registered charge,—

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking;

enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, notwithstanding the fact that no intimation has been received by him from the company.

This section gives power to the Registrar to make an entry of satisfaction or release, even though the company has not made a report to him in pursuance of s. 138. This is based on the provision contained in s. 100 of the English Act of 1948—*Notes on Clauses*.

See the previous section.

**140. Copy of memorandum of satisfaction to be furnished to company.**—Where the Registrar enters a memorandum of satisfaction in whole or in part, in pursuance of section 138 or 139, he shall furnish the company with a copy of the memorandum.

This section is new. It has been inserted by the Joint Committee. See s. 138 and notes thereto.

**671. Memo of satisfaction** :—Where a memorandum of satisfaction is executed by the company under a misapprehension, it may be ordered by the Court to be cancelled (48). When once a certificate of registration has been given by the

Registrar, it is unnecessary for the secured creditors to take any steps to rectify the register, however defective or misleading it may be (49).

This section corresponds to s. 120 of the previous Act and s. 101 of the English Act of 1948—*Notes on Clauses*.

## 141. Rectification by Court of register of charges.—

### (1) The Court, on being satisfied—

(a) that the omission to register a charge within the time required by this Part, or that the omission or mis-statement of any particular with respect to any such charge or any memorandum of satisfaction or other entry made in pursuance of section 138 or 139, was accidental, or due to inadvertence, or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company; or

(b) that on other grounds it is just and equitable to grant relief ;

may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for the registration shall be extended or, as the case may require, that the omission or misstatement shall be rectified.

(2) The Court may make such order as to the costs of an application under sub-section (1) as it thinks fit.

(3) Where the Court extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.

This section corresponds to s. 120 of the previous Act and s. 101 of the English Act of 1948—*Notes on Clauses*.

**672. Meaning of "accident" and "inadvertence" :—**An "accident" is a mishap or untoward event not expected or designed (50), while the word "inadvertence" includes ignorance of the provisions requiring registration (51). Here the words, "accidental or due to inadvertence" have a very wide meaning (52).

**673. Court's power to grant extension of time :—**The Court is entitled to extend the time provided it is satisfied that *any one* of the following conditions is satisfied, namely, (1) the omission was accidental or due to inadvertence or to some other sufficient cause ; (2) the omission is not of a nature to prejudice the position of the creditors or the shareholders ; (3) on other grounds it is just and equitable to

(49) *National P. & U. Bank v. Charnley* [1924] 1 K.B. 431.

(50) *Fenton v. Thorley & Co.* [1903] A.C. 443.

(51) *Mendip Press* [1901] 18 T.L.R. 38.

(52) *Jackson & Co.* [1899] 1 Ch. 348.

grant relief (53). The Court may grant relief if any one of the alternative conditions is satisfied. The words "due to inadvertence" are satisfied if there is negligence or carelessness, when the circumstances show an absence of bad faith (54). The Court's power to grant an extension of time is a discretionary power in that the statutory right of the chargee to be relieved of the consequences of his negligence is subject to his proving to the satisfaction of the Court that the omission to register within the proper time was not fraudulent, but was accidental or due to inadvertence or to some other sufficient cause and therefore the Court should be fully informed of the circumstances which gave rise to the omission, and the evidence should not merely state that the matter was accidental or due to inadvertence (55). In the last cited case evidence was given that the failure to register was due to the fact that the secretary of the company thought that the chargees had registered, while the chargees thought that the secretary had registered. *Held* (i) the evidence, though meagre, was just sufficient to satisfy the provisions of the section and the extension should be granted; (ii) the insolvency of the company was not a matter to which the Court need pay attention.

This section confers on the Court a wide judicial discretion, in exercising which it is not material to consider (a) the solvency or insolvency of the company, (b) the presence or absence of any judgment against the company and (c) the pendency of a winding up petition. Even if the petitioner makes out a condition of relief, the Court is not bound to extend the time and may decline to do so in appropriate circumstances, e.g., where the order for extension will be useless (54).

If a winding up order is made, the unsecured creditors will acquire a right under the order in respect of the properties of the company and such right will attach as from the date of presentation of the winding up petition. In such a case the Court may, in its discretion, refuse to grant relief under this section on the ground that the rights of unsecured creditors have been crystallized by a winding up order (56).

**674. Where relief is granted :-** Relief has been granted where there was delay owing to misunderstanding as to the documents requiring registration; where the secretary *bona fide* believed that owing to the date of the resolution allotting the debentures the Act did not apply to them; where a deed had been sent to India before the Act came into force for execution and registration there but was not executed until after the Act came into force; where the secretary was imperfectly acquainted with the Act; and where there was a difficult question whether registration was necessary or not (57). It is the practice to support the application with evidence that no winding up is pending and no judgment has been recovered against the company and remains unsatisfied (58). Where there was evidence that the omission to register the debenture trust-deed was wholly unintentional due to inadvertence on the part of the officers of the company and the parties acted *bona fide*, the time for registration was extended for 10 days from the date of the order (59). Where a series of mortgage debentures and the trust-deed could not be registered within 21 days on account of difficulty with the Inland Revenue as to the amount of stamp on the trust-deed, time for registering was extended (60).

(53) *Thuppan Nambudri v. Sankara Menon* [1955] M. 35; see also *Chandbali Steamer Service Co.* [1956] 60 C.W.N. 278.

(54) *Chandbali Steamer Service Co.*, *supra*.

(55) *Cris Cruisers, Ltd.* [1918] 2 A.E.R. 1105; *Air Transport Ltd.* [1955] 60 C.W.N. 64.

(56) *Air Transport Ltd.*, *supra*.

(57) Buckley 11th ed. pp. 194 & 195 and cases cited there.

(58) *Ibid.*, p. 195.

(59) *Tingri Tea Co.* [1901] W.N. 165.

(60) *Booth G. S. & Ice Co.* [1901] W.N. 54.

**675. Order without prejudice to rights acquired :—**The order under this section was usually expressed to be without prejudice to the rights of parties acquired prior to the time when such charge should be actually registered (61); but the Court would not necessarily impose any terms for the protection of the unsecured creditors (62). In *Cris Cruisers Ltd.* (55) at p. 1106 Mr. Justice Vaisey ordered as follows: "The protecting words will go into this order as they go into every similar order so far as my experience goes, and the effect of them is now, I think, a matter which is beyond discussion, at any rate in this Court, namely, that they are for the protection of persons to whom have accrued rights of property in the assets of a company and that they do not extend to protect the inchoate rights of unsecured creditors as such." The usual proviso, namely, that the order would be without prejudice to the rights of parties acquired prior to the date of actual registration, only protected creditors who had acquired a security on the property, the subject matter of the charge; the Court would not insert in the order any terms for the protection of unsecured creditors of the company (63). Now sub-s. (3) makes it unnecessary to make the protecting order.

Where a mortgage of immovable property was given by a company in May, 1949, the mortgage was registered under the Companies Act in December, 1950, and a charge for income-tax was created on the mortgaged property between May, 1949 and December, 1950 by virtue of a demand notice under the Income-tax Act, it was held that the mortgage was postponed to the charge (64). A mortgage by a company after the winding up petition but before the winding up order is void. The winding up order relates back of the winding up petition (64) [*vide* s. 536 *post*].

**676. Ranking *pari passu*** If the debentures are registered under an order such as the above before the company goes into liquidation, an ordinary unsecured creditor at the date when the debentures are registered is not entitled to rank *pari passu* with the holders of such debentures, unless he has taken steps to enforce his claim (65).

**677. Effect of order :—**When an order extending the time is made in the usual terms as stated above, and before actual registration a winding-up commences, the mortgage or charge, if subsequently registered, will not be effective against the general body of creditors (66). The rights acquired by the general body of creditors under an order for winding up is an accrued right acquired in respect of all the assets of the company including the property concerned and is, therefore, protected by sub-s. (3) (67). Even if an order for extension is made after an order for winding-up has been made and a liquidator has been appointed, the applicant for extension of time cannot enforce the unregistered charge against the liquidator, and cannot also acquire any priority over any creditor of the company. The order in such circumstances is therefore useless, and the Court in the exercise of its discretion will not make any such order (67). Where the registration is made long after 21 days after the date of mortgage and order of the Court extending the period is vacated, there is no valid registration (68).

(61) *Spiral Globe, Ltd.* [1902] 1 Ch. 396; *Joplin Breweries Co.* [1902] 1 Ch. 79; *I. C. Johnson & Co.* [1902] 2 Ch. 101. See also *Chandbali Steamer Service Co.*, *infra*.

(62) *Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627.

(63) *M. I. G. Trust Ltd.* [1923] 1 Ch. 542 (C.A.); statement of Buckley J. in *Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627, 630 regarding the protection of unsecured creditors was dissented from by Romer L. J. in this case.

(64) *Parjoar Hosiery Mills* [1955] N.U.C. 410 (Cal.).

(65) *Ehrmann Brothers* [1906] 2 Ch. 697.

(66) *Anglo-Oriental Carpet Co.* [1903] 1 Ch. 914, per Buckley J.; see also *Spiral Globe Ltd.*; *supra.*; *Ehrmann Bros. Ltd.*, *supra.*; *Dinshaw & Co. Bankers Ltd.* [1937] O. 62, [1936] O.W.N. 923.

(67) *Chandbali Steamer Service Co.* [1956] 60 C.W.N. 278.

(68) *Dinshaw & Co. Bankers, Ltd.* (*supra.*); *Joplin Breweries Co.* (*supra.*).



An order passed under this section comes under s. 141 C. P. Code and is open to review (69).

**678. Sub -s. (3) :—**This sub-section makes it clear that the extension of time will not prejudice any right acquired before the actual registration within the extended time (70).

This sub-section excludes unsecured creditors and their rights, even when there is winding-up order. The solvency of the company is not relevant in disposing of an application for extension of time (71).

**142. Penalties.—**(1) If default is made in filing with the Registrar for registration the particulars—

(a) of any charge created by the company ;

(b) of the payment or satisfaction, in whole or in part, of a debt in respect of which a charge has been registered under this part ; or

(c) of the issues of debentures of a series ;

requiring registration with the Registrar under the provisions of this Part, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the other requirements of this Act as to the registration with the Registrar of any charge created by the company or of any fact connected therewith, the company, and every officer of the company who is in default, shall, without prejudice to any other liability, be punishable with fine which may extend to one thousand rupees.

This section corresponds to s. 122 of the previous Act and ss. 96 (3) and 99 (2) of the English Act of 1948—*Notes on Clauses*.

**679. “Knowingly and wilfully” :—**Where directors instruct the secretary to register the security and he omits to do so, they are not knowingly and wilfully authorizing or permitting the omission (72).

(69) *Dinshaw & Co., Bankers Ltd.* (supra).

(70) *Radha Krishna v. Ram Narain* [1927] O. 300, 120 I.C. 592 ; *Monolithic Building Co.* [1915] 1 Ch. 643.

(71) *Thuppan Nambudri v. Sankara Menon* [1955] M. 35.

(72) *Borough of Hackney Newspaper Co* [1876] 3 Ch. D. 669.

**680. Meaning of "issued".**—Debentures sealed but not delivered are not "issued" (73). Debentures agreed to be issued will be treated as "issued" (74).

**143. Company's register of charges.**—(1) Every company shall keep at its registered office a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case—

(i) a short description of the property charged ;

(ii) the amount of the charge ; and

(iii) except in the case of securities to bearer, the names of the persons entitled to the charge.

(2) If any officer of the company knowingly omits, or wilfully authorises or permits the omission of, any entry required to be made in pursuance of sub-section (1), he shall be punishable with fine which may extend to five hundred rupees.

This section corresponds to s. 123 of the previous Act and s. 104 of the English Act of 1948—*Notes on Clauses.*

**681. Borrowing power of a company** :—A company has no power to borrow money unless the memorandum or articles of association so provide ; but it can do so if such borrowing is incidental to the course of the company's business (75). The ordinary trading company has an implied power to borrow money for the purpose of its business and to give security for its repayment even though no power to do so has been conferred by the memorandum or the articles (76). When the memorandum mentions as a purpose of the company the "disposing of" its landed property, the company can mortgage it unless expressly prohibited from doing so (77). In the absence of any prohibition a company may secure a past debt by deposit of title deeds (77).

**682. Power to give mortgage** :—A company having power to borrow can give mortgage or charge over all its property including book-debts not yet due (78), or on its uncalled capital (79), except that capital which can be called upon only in the event of a winding-up (80). A power to mortgage "the property of the company" (81), or its "property and effects" (82), or its "undertaking and property present and

(73) *Levy v. Abercorri's Slate Co.* [1887] 37 Ch. D. 260.

(74) *Perth Electric Tramway Co.* [1906] 2 Ch. 216.

(75) *Blackburn Building Society v. Cunliffe, Brooks & Co.* [1882] 22 Ch. D. 61 ; see also notes to ss. 13 and 125.

(76) *General Auction Estate Co. v. Smith* [1891] 3 Ch. 432.

(77) *Patent File Co.* [1870] 6 Ch. App. 83 ; see the judgment of Sir G. Mellish, L. J. at p. 88.

(78) *Bloomer v. Union Coal & Iron Co.* [1873] 16 Eq. 383 ; *Illingworth v. Houldsworth* [1904] A.C. 355.

(79) *Newton v. Anglo-Australian Investment Co.* [1895] A.C. 244 (P.C.) ; *Jackson v. Rainford Coal Co.* [1896] 2 Ch. 340.

(80) *Bartlett v. Mayfair Property Co.* [1898] 2 Ch. 28.

(81) *Johnson v. Russian S. Patent Ltd.* [1898] 2 Ch. 149 ; the word "property" is sufficient to include goodwill or business ; *Leas Hotel Co.* [1902] 1 Ch. 332.

(82) *Sankey B. Coal Co.* [1870] 10 Eq. 381.

future" (83) does not however authorize a charge on the uncalled capital. But if the company is authorized to mortgage its "assets" (84), or its "property and rights" (85), or its "property and effects or in such other manner as the company determine" (86), it can create a charge over its uncalled capital. If the company has only a limited power to borrow, a loan beyond the limit and all securities for it are void (87).

**683. Charge created in favour of director or officer** :—A charge created by the directors on the assets of the company when it is still a going concern is not illegal ; but a charge created in favour of the officers of the company is void if it is not registered under this section (88). A person who ceases to hold any office at the time of creation of the charge is however not an "officer of the company" within the meaning of this section (88).

**144. Right to inspect copies of instruments creating charges and company's register of charges.**—(1) The copies of instruments creating charges kept in pursuance of section 136, and the register of charges kept in pursuance of section 143, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day are allowed for inspection) to the inspection of any creditor or member of the company without fee, at the registered office of the company.

(2) The register of charges kept in pursuance of section 143 shall also be open, during business hours but subject to the reasonable restrictions aforesaid, to the inspection of any other person on payment of a fee of one rupee for each inspection, at the registered office of the company.

(3) If inspection of the said copies or register is refused, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees and with a further fine which may extend to twenty rupees for every day during which the refusal continues.

(4) The Court may also by order compel an immediate inspection of the said copies or register.

This section corresponds to s. 124 of the previous Act and s. 105 of the English Act of 1948—*Notes on Clauses*.

**684. Inspection and right to take copies** :—The right given to the holders of stock and debentures of inspecting the registers is not confined to an inspection of

(83) *Streatham &c. Estate Co.* [1897] 1 Ch. 15.

(84) *Page v. International Agency* [1893] 68 L.T. 435.

(85) *Howard v. Patent Ivory Manufacturing Co.* [1888] 38 Ch. D. 156.

(86) *Jackson v. Rainford Coal Co.* (supra).

(87) *Wenlock v. River Dec Co.* [1885] 10 App. Cas. 354.

(88) *Balasubramania v. Kandasami* [1916] 32 I.C. 91.

the names and addresses only, it may be exercised without assigning any reason, and can be enforced by an injunction (89). The right to inspect the register of mortgages involves a right to take copies of the same (90). The person inspecting the register of the holders of debentures cannot however take a copy himself (91).

In the case noted below (92) "income stock certificates" were held to be debentures and the holders of those certificates were held to be entitled to inspection of the register thereof. The register of mortgages should be open to inspection by any creditor or member of the company or his solicitor or agent (93).

**685. Effect of winding-up :**—Upon a winding-up the register cannot be inspected without an order of the Court (94). The word "books" in s. 156 of the English Act of 1862 which corresponds to s. 549 *post* includes the register of mortgages (94).

**145. Application of Part to charges requiring registration under it but not under previous law.**—In respect of any charge created before the commencement of this Act which, if this Act had been in force at the relevant time, would have had to be registered by the company in pursuance of this Part but which did not require registration under the Indian Companies Act, 1913 (VII of 1913), and in respect of all matters relating to such charge, the provisions of this Part shall apply and have effect in all respects, as if the date of commencement of this Act had been substituted therein for the date of creation of the charge, or the date of completion of the acquisition of the property subject to the charge, as the case may be.

Nothing contained in this section shall be deemed to affect the relative priorities as they existed immediately before the commencement of this Act, as between charges on the same property.

This section is new. It provides for the registration of charges created before the coming into operation of this Act which require registration under its provisions but which did not require registration under the previous Act. In such a case, the date on which this Act comes into operation is to be treated as the date on which the charge was created or on which the property subject to the charge was acquired.—*Notes on Clauses.*

The date of commencement of this Act is 1st April, 1956—see notes to s. 1 *ante*.

(89) *Holland v. Dickson* [1888] 37 Ch. D. 669.

(90) *Nelson v. Anglo-American Land Co.* [1897] 1 Ch. 130

(91) *Balaghat Gold Mining Co.* [1901] 2 K.B. 665.

(92) *Lemon v. Austin Friars Investment Trust* [1926] Ch. 1. (C.A.).

(93) *Credit Company* [1879] 11 Ch. D. 256.

(94) *Somerset v. Land Securities Co.* [1897] W.N. 29; *Vide* s. 549.

## PART VI MANAGEMENT AND ADMINISTRATION

### CHAPTER I

#### GENERAL PROVISIONS

##### *Registered Office and Name*

**146. Registered office of company.**—(1) A company shall, as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office, and of every change therein, shall be given within twenty-eight days after the date of the incorporation of the company or after the date of the change, as the case may be, to the Registrar who shall record the same :

Provided that except on the authority of a special resolution passed by the company, the registered office of the company shall not be removed—

(a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act, or where it may be situated later by virtue of a special resolution passed by the company ; and

(b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated, or where it may be situated later by virtue of a special resolution passed by the company.

(3) The inclusion in the annual return of a company of statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by sub-section (2).

(4) If default is made in complying with the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section corresponds to s. 72 of the previous Act. As recommended by the C. I. C., provision was made to the effect that except on the authority of a

special resolution passed by the shareholders the registered office of the company should not be moved more than 10 miles from its location at the commencement of the Act, or in the case of a company which is established after the commencement of this Act, from the place where it was first situated. In sub-s. (3) provision has been made for the punishment not only of the company but also of officers of the company who act in contravention of this section. See s. 107 of the English Act of 1948.—*Notes on Clauses.*

This was originally cl. 139 of the Bill. The Joint Committee have made considerable changes in this section with the following remark: "The Committee have substituted a new proviso for the existing proviso to sub-clause (2). Removal of the registered office to a place in the same city, town or village, although at a greater distance than ten miles from the former registered office will be permissible" (*vide J.C.R.*, para 63).

At the end of sub-s. (4) the Lok Sabha has substituted the words "the default continues" for the words "it so carries on business."

**686. Scope** :—This section is merely permissive and not imperative; it only provides one of several methods whereby a communication or notice may be served on a company (95).

**687. Service must be effected at registered office** :—A summons to appear before a Magistrate must be served at the registered office, and appearance by a solicitor to raise a point of substance only is not a waiver of the objection (96). Where there is no registered office, service at the office in fact used by the company will be sufficient (97). Where there is no office, the company having ceased to carry on business, service on some of the late officers may be allowed (98). Service at any other place, even if the company carries on business there, is insufficient (96).

In the absence of evidence to the contrary, the Court will infer that a clerk at the registered office of a company is, during business hours and whilst the secretary is absent, so far in charge of the office that he has authority to receive a notice as to make it a communication to the company (99).

Where the registered office of a company still exists at the usual place, but a part of the company's business has been shifted to some other place without any notification of such change to the Registrar, all the notices &c. must be addressed to the usual registered office (1). In the last cited case *Panckridge J.* observed: "I find myself unable to accept Mr. S. C. Roy's contention that s. 72 (of the old Act) shows that a resolution to change the registered office is sufficient and that the only effect of failure to notify the change is to render the company liable to fine under sub-s. 3."

**688. In suit** :—In a suit against a corporation the summons may be served—(a) on the secretary or any director or principal officer of the corporation, (b) by leaving or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business (2). As to the mode of service of any document on a company see s. 51.

**Form** :—For the form of notice of situation or change of situation of registered office, pursuant to this section, see Form No. 18 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

(95) *Dawsons Bank v. Municipal Committee* [1941] R. 339 (S.B.).

(96) *Pearks, Gunston & Tee Ltd. v. Richardson* [1902] 1 K.B. 91.

(97) *Fortune Copper Mining Co.* [1870] L.R. 10 Eq. 390.

(98) *Gaskell v. Chambers* [1858] 26 Beav. 252.

(99) *Truman's case* [1894] 3 Ch. 272.

(1) *Janbazar Manna Estate, Ltd.* [1931] C. 692, 58 Cal. 716, 133 I.C. 321.

(2) O. 29, r. 2, C.P.C.; see also s. 20, C.P.C., Explan. II; but see *Hope Mills v. Vithaldas* [1910] 12 Bom. L.R. 730.

**147. Publication of name by company.—(1) Every company—**

(a) shall paint or affix its name, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible; and if the characters employed therefor are not those of the language, or of one of the languages, in general use in that locality, also in the characters of that language or of one of those languages;

(b) shall have its name engraven in legible characters on its seal; and

(c) shall have its name mentioned in legible characters in all its business letters, in all its bill heads and letter paper, and in all its notices, advertisements and other official publications; and in all bills of exchange, hundies, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

(2) If a company does not paint or affix its name, or keep the same painted or affixed in the manner directed by clause (a) of sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed.

(3) If a company fails to comply with clause (b) or clause (c) of sub-section (1), the company shall be punishable with fine which may extend to five hundred rupees.

(4) If an officer of a company or any person on its behalf—

(a) uses, or authorises the use of, any seal purporting to be a seal of the company whereon its name is not engraven in the manner aforesaid;

(b) issues, or authorises the issue of, any business letter, bill head, letter paper, notice, advertisement or other official publication of the company wherein its name is not mentioned in the manner aforesaid;

(c) signs, or authorises to be signed, on behalf of the company, any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods wherein its name is not mentioned in the manner aforesaid ; or

(d) issues or authorises the issue of, any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in the manner aforesaid ;

such officer or person shall be punishable with fine which may extend to five hundred rupees, and shall further be personally liable to the holder of the bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless it is duly paid by the company.

SS. 73 and 74 of the previous Act have been combined on the lines of s. 108 of the English Companies Act of 1948. The drafting has been simplified and made clearer—*Notes on Clauses*.

By the Joint Committee the words "wherein its name is not mentioned in the manner aforesaid" have been added in cl. (b) of sub-s. (4).

**689. Object :**—The object of this section is to make the company itself continually bring to notice of those who dealt or might deal with it, the fact that it is a limited concern. This section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business (3).

**690. Requirements how satisfied :**—The requirements of the section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building in which it is situate, and therefore it cannot be said that when an office is situated within a compound, the name of the company should be painted or affixed outside the compound as well as outside the office (3).

**691. Construction :**—This section being a penal provision should be construed strictly. The words "outside of every office" in cl. (a) of the section cannot be construed to mean outside the premises in which the office is situate (3).

**692. Use of the word "limited" :**—The abbreviations "Ltd." or "Ld." may be used for the word "Limited" (4). If a limited company makes a contract without using the word "Limited", the directors who make the contract on behalf of the company will be personally liable (5). For the protection of the public the strictest accuracy is to be observed in this respect (6).

As to the company's seal, see notes to s. 84 and reg. 84, Table A.

**693. Company described by a wrong name :**—Where *South Shields Salt Water Baths & Co.* was described in a bill as the *Salt Water Baths Ltd.*, it was held

(3) *Dr. H. L. Batliwalla, Sons & Co. v. Emperor* [1941] B. 97, 43 Bom L.R. 105.

(4) *F. Stacey & Co. v. Wallis* [1912] 106 L.T. 544.

(5) *Atkins & Co. v. Wardle* [1889] 58 L.J.Q.B. 377, on appeal [1889] 5 T.L.R. 734 ; *Penrose v. Martyr* [1858] F. B. & E. 499, 28 L.J.Q.B. 28 ; *Chapman v. Smethurst* [1909] W.N. 65, reversed on appeal in [1909] 1 K.B. 927.

(6) *Nassau Steam Press v. Tyler* [1894] 70 L.T. 376 ; but see *Dermatine Co. v. Ashworth* [1905] 21 T.L.R. 510.



that the directors were personally liable on the bill (7). So it is of great importance to see that the name of the company is fully and correctly written in the bill of exchange, hundi &c. Where the directors describe the company by a wrong name on a bill accepted by them on behalf of the company, they will be personally liable (8).

**SUB-S. (4) :—**The word "holder" in sub-sec. (4) means, in the case of an order for goods, the person to whom the order is given (9).

**148. Publication of authorised as well as subscribed and paid-up capital.—**(1) Where any notice, advertisement or other official publication, or any business letter, bill head or letter paper, of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication, or such letter, bill head or letter paper, shall also contain a statement, in an equally prominent position and in equally conspicuous characters, of the amount of the capital which has been subscribed and the amount paid up.

(2) If default is made in complying with the requirements of sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

This section corresponds to s. 75 of the previous Act. The provisions have been made applicable to business letters, bill-heads and letter paper. A few drafting alterations have also been made—*Notes on Clauses*.

This section is not in the English Act.

### *Restrictions on Commencement of Business*

**149. Restrictions on commencement of business.—**(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription ;

(b) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription ;

(7) *Atkins & Co. v. Wardle* (supra) : *Dermatine & Co. v. Ashworth* (supra).

(8) *Nassau Steam Press v. Tyler* (supra).

(9) *Civil-Service Co-operative Society v. Chapman* [1914] W.N. 369, 30 T.L.R. 679.

(c) no money is, or may become, liable to be repaid to applicants for any shares or debentures which have been offered for public subscription by reason of any failure to apply for, or to obtain, permission for the shares or debentures to be dealt in on any recognized stock exchange; and

(d) there has been filed with the Registrar a duly verified declaration by one of the directors or the secretary, in the prescribed form, that clauses (a), (b) and (c) of this sub-section, have been complied with.

(2) Where a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

(a) there has been filed with the Registrar a statement in lieu of prospectus;

(b) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash; and

(c) there has been filed with the Registrar a duly verified declaration by one of the directors or the secretary, in the prescribed form, that clause (b) of this sub-section has been complied with.

(3) The Registrar shall, on the filing of a duly verified declaration in accordance with the provisions of sub-section (1) or sub-section (2), as the case may be, and, in the case of a company which is required by sub-section (2) to file a statement in lieu of prospectus, also of such a statement, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

(4) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(5) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on applications for debentures.

(6) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be punishable with fine which may extend to five hundred rupees for every day during which the contravention continues.

(7) Nothing in this section shall apply to—

(a) a private company ; or

(b) a company registered before the first day of April, 1914, which has not issued a prospectus inviting the public to subscribe for its shares.

(8) The provisions of this section, in so far as they do not relate to shares, shall also apply to a company limited by guarantee and not having a share capital.

This section corresponds to s. 103 of the previous Act and s. 109 of the English Act of 1948. S. 109 (1) (c) of the English Act has been incorporated as suggested at page 299 of C. L. C. R. The addition will prevent companies from commencing business until it has been ascertained that no money is liable to be repaid to applicants for shares or debentures offered for public subscription by reason of failure to obtain permission for the shares or debentures to be dealt in on a stock exchange—*Notes on Clauses*.

The Joint Committee have made some verbal changes in this section.

**694. Interference by Court :—**The Court will not interfere to prevent the directors from commencing business on the ground that all the nominal capital has not been subscribed for, nor on the ground that the business actually commenced is on a much smaller scale than that contemplated by the prospectus (10).

**695. Winding up before commencement of business .** If a company is wound up without having become entitled to commence business, persons who have supplied goods or rendered services will have no claim against the company (11). Even the bank which received the application money cannot recover for its services (12).

**696. Contract made before incorporation :—**No contract can bind a company which has been entered into with regard to it, when as yet it has no existence, in the absence of adoption and ratification of the agreement or of the company's entering into a fresh contract (13). The question of adoption of the agreement is a question of fact (13). But a contract can be made with a trustee for the company before its incorporation, in which case the trustee will be personally liable, unless he expressly protects himself from liability by including a power to rescind the contract (14). It is usual in such a case to make it one of the objects in the memorandum of association and also to provide in the articles that the directors shall adopt the preliminary agreement. But this will not bind the company, unless a

(10) *Mac Dougall v. Jersey Imperial Hotel Co* [1864] 2 H. & M. 528.

(11) *"Otto" Electrical Manfg. Co* [1906] 2 Ch. 390.

(12) *New Druce Portland Co. v. Blakiston* [1908] 24 T.L.R. 583.

(13) *Ganesh Flour Mills Co. v. Puran Mal* 129 P.L.R. 1904, 2 P.R. 1905 ; *Natal Land Co. v. Pauline Colliery Syndicate*, (infra).

(14) *Kelner v. Baxter* [1866] L.R. 2 C.P. 174.

new contract is entered into by which the company agrees to be bound by the terms of the preliminary agreement (15). See notes to s. 34, *ante* for full discussion of the question.

**697. Adoption of agreement :—**A company cannot ratify or adopt a contract entered into by a person on its behalf before its incorporation, though it may enter into a new contract embodying the terms of the old one or adopting the old one (16). A resolution of the board of directors adopting the agreement will not however create a contract between the company and the vendor (17). A new contract in some cases may be inferred from the circumstances and the conduct of parties (18). But the fact that the directors think that they are bound by the contract with the trustee and act accordingly is not enough even though large sums of money are expended and work is done in that mistaken belief (19). For full discussion of the question see note to s. 34 *ante*.

**698. Agreement should be executed after incorporation :—**Where the contract is purported to be made with the company itself, it is sometimes prepared before its incorporation and then referred to in the memorandum of association and the articles as an "agreement already drawn up and intended to be executed," and for identification, signed or initialed by some of the subscribers to the memorandum or by a solicitor. In such a case the agreement requires to be executed by the company and this must be done after due consideration by the directors who must exercise their judgement upon it, and if they are not an independent body, the company may repudiate the contract (20).

**699. Borrowing powers :—**As regards borrowing powers it should be remembered that every trading company has an implied power to borrow money and to charge its property as security for payment of the loan (21). A company which borrows money to pay off existing debts does not thereby increase its liability (22).

**700. SUB-S. (1) (a) & (b). Payment in cash :—**In order that a transaction between a company and allottee of shares may amount to "payment in cash," each party must have an actual demand on the other for present payment (23). Any circumstance giving rise to a right of set off or an agreement to render services may be a good payment (24). "In *Fothergrill's case*" (25), observed Lord Justice James, "the bargain in effect was to give paid up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares,

(15) *Re Olympia Ltd.* [1898] 2 Ch. 153 at p. 168, following *Eley v. Positive &c. Insurance Co.* [1875] 1 Ex. D. 20 at p. 88 and *Browne v. La Trinidad* [1887] 37 Ch. D. 1 at p. 19; *Northumberland Avenue Hotel Co.* [1886] 33 Ch. D. 16; see *Natal Land Co. v. Pauline Colliery Syndicate* [1904] A.C. 120.

(16) *Surendro & Co. v. Punjab Tannary Co.* [1923] L. 100, 68 I.C. 789; *Natal Land Co. v. Pauline Colliery Syndicate* (supra).

(17) *Johannesburgh Hotel Co.* [1891] 1 Ch. 119; *North Sydney Investment Co. v. Higgins* [1899] A.C. 263.

(18) *Natal Land Co. v. Pauline Colliery Syndicate* (supra).

(19) *Northumberland Avenue Hotel Co.* (supra); *Dansk Rekytriffel Syndikat v. Snell* [1908] 2 Ch. 127; *English & Colonial Produce Co.* [1906] 2 Ch. 435.

(20) *Langunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392.

(21) *General Auction &c. Co. v. Smith* [1891] 3 Ch. 432.

(22) *Harris Calculating Machine Co.* [1914] W.N. 133, [1914] 1 Ch. 920.

(23) *Johannesburgh Hotel Co.* [1891] 3 Ch. 119.

(24) *Spargo's case* [1873] 8 Ch. App. 407; *Larocque v. Beauchemin* [1897] A.C. 358; *North Sydney Investment Co. v. Higgins* [1899] A.C. 263; *Parshotamdas v. Iswardas* [1892] 16 Bom. 161.

(25) [1873] 8 Ch. App. 270.

so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Forthergill's case* (25) and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but if the two demands are set off against each other the shares have been paid for in cash" (26).

A cheque is not a payment until it has been cashed (27).

**701. Cl. (d). Declaration :—**A person who signed the prospectus tendered his resignation before the declaration under cl. (d) was sent to the Registrar and before the company commenced business : *held* that it could not be said that he was guilty of any misfeasance by reason of which any pecuniary loss was sustained by the company by virtue of payment made after his resignation (28).

**702. SUB-S. (3). Certificate conclusive :—**The certificate of the Registrar is conclusive and the Court will not take any evidence that there have been irregularities (29). Any allotment by a public company which neither issues a prospectus nor files a statement in lieu of prospectus is altogether void; but if a statement has been filed and the Registrar's certificate obtained, inaccurate or insufficient particulars do not render the statement a nullity or the allotment absolutely void (30).

**703. SUB-S. (4). Meaning of "provisional" :—**The word "provisional" means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business (31); so the company cannot be sued on such a contract whether express or implied (31). A company does not by its adoption of a contract of purchase made before its formation by persons purporting to act on its behalf incur any contractual relation with or obligation to the vendor (32). A company cannot ratify a contract made before its incorporation, for it was not in existence at the time (33).

**704. Application :—**This sub-section applies to all contracts of the company, whether preliminary or final or in the course of carrying on its business (34). Where a statute prohibits a company from making a binding contract before commencement of business, no implication of a promise to pay can or should be made under s. 70 of the Contract Act (34). Where the company never became entitled to commence business, the expenses incurred cannot be deemed to be for its benefit under s. 70 of the Contract Act (34). Registration fee and expenses incurred by a company which never commenced business are not payable out of the assets of the company and the person incurring such expenses cannot recover the same (34).

**705. Pre-incorporation and post-incorporation expenses :—**This section applies to all contracts of a company whether preliminary or otherwise. The company is not therefore liable for costs and expenses incurred in respect of its formation and promotion, and in the case of a company which never commences its business, also for expenses such as *stamp and registration fees*, postal and other charges, and publicity and travelling expenses incurred even after incorporation (34), although

(26) Spargo's case (supra) at p. 412.

(27) Mears v. Western Canada Pulp & Paper Co [1905] 2 Ch. 353; National Motor Mail Coach Co. [1908] 2 Ch. 228; Burton v. Bevan [1908] 2 Ch. 240.

(28) Subbaya v. Manthayya [1942] M 365, [1942] 1 M.L.J. 207, 55 M.L.W. 165, 204 I.C. 425.

(29) Yolland, Husson & Birkett Ltd. [1908] 1 Ch. 152.

(30) Blair Open Hearth Furnace Co. [1914] 1 Ch. 390.

(31) Otto Electrical Manfg. Co. (supra); Ambica Textiles Ltd. [1949] 54 C.W.N. 157.

(32) North Sydney Investment Co. v. Higgins (supra).

(33) Kelner v. Baxter [1866] 2 C.P. 174; Melhado v. Porto Alegre &c. Ry. Co. [1874] 9 C.P. 503 at p. 505.

(34) Ambica Textiles Ltd. (supra).

the company was under a statutory liability to pay them as held by Buckley J. in *English & Colonial Produce Co.* (1906) 2 Ch. 435 which was overruled in the under-noted case (35) where Cozens-Hardy M. R. observed as follows : "I need hardly say that any opinion expressed by Buckley J., especially upon this branch of law, deserves the greatest respect, but I cannot concur in the view which he took and Mr. Eustace Smith confesses that he had not been able to find any other authority differentiating between a statutory liability and any other liability in relation to this question. There is no other ground upon which the judgment can be supported, and I know of no principle or authority on which that distinction can be maintained."

A contract made with the trustee for a company is not binding on the latter (36), unless a new contract is made after its incorporation (37). A resolution of the board adopting the contract will not suffice (38).

**706. SUB-S. (6) :—**The words "every person who is responsible for the contravention" would include directors, managers and other executive officers and possibly the secretary (39).

**Forms :—**For the form of (1) declaration of compliance with the provisions of sub-s. (1) (a), (b) and (c) pursuant to sub-s. 1 (d) of this section and (2) declaration of compliance with the provisions of sub-s. (2) (b) of this section pursuant to sub-s. (2) (c) thereof, see Forms Nos. 19 and 20 respectively of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

### *Registers of members and debenture holders*

**150. Register of Members.—**(1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars :—

(a) the name and address, and the occupation, if any, of each member ;

(b) in the case of a company having a share capital, the shares held by each member, distinguishing each share by its number, and the amount paid or agreed to be considered as paid on those shares ;

(c) the date at which each person was entered in the register as a member ; and

(d) the date at which any person ceased to be a member :

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.

(35) *National Motor Mail Coach Co.* [1908] 2 Ch. 515.

(36) *Ooregum G. M. Co. v. Roper* [1892] A.C. 125 ; *Hong-Kong & China Gas Co. v. Glen* [1914] 1 Ch. 527.

(37) *Northumberland Avenue Hotel Co.* [1886] 33 Ch. D. 16.

(38) *North Sydney Investment Co. v. Higgins* [1899] A.C. 263.

(39) Cf. *Burton v. Bevan* [1908] 2 Ch. 240.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

SS. 150 to 156 correspond to ss. 31, 31A, 33, 38 and 39 of the previous Act. The provisions about annual returns (s. 32 of the old Act) have been embodied in a later section, and those relating to transfer of shares (ss. 34 and 35 of the old Act) have been embodied in earlier sections.—*Notes on Clauses.*

The proviso to sub-s. (1) incorporates the provision contained in the proviso to s. 110 (1) of the English Act of 1948 as recommended by the C. L. C. at page 237 of the Report—*ibid.*

S. 150 corresponds to s. 31 of the previous Act and s. 110 of the English Act of 1948.

In this section also the Joint Committee have made some verbal alterations.

**707.** The register of members must be kept at the registered office until the company goes into liquidation (40).

**708. How registers are kept :—**The Act does not prescribe any particular system of keeping the register, but only requires that it shall contain the particulars mentioned in this section (41). More than one book may be used (42). If there is a substantial compliance with the requirements of the Act, the register is not invalidated by reason of a slight deviation from its directions or by unimportant omissions or defects in the particulars of information specified in the section (43). The company must not enter in the register or share certificate a statement of any lien on the shares (44). It should not put on the register anything except what is required under the Act (45). An executor is entitled to be put on the register on proof of his title, and the company is not entitled to qualify the entry by showing that he holds the shares in a representative capacity (45). A partnership should not be entered in the register in the firm name (46). Two or more persons getting a transfer in their partnership name are not entitled to be entered on the register in their partnership name, for a firm is not a person (46). But the word used is "member" and not "persons." See *Weikersheim's case* (42).

If shares are paid in money's worth, the register must show that they are paid up, though no money has actually passed (47).

Where a company has converted any of its shares into stock, the register must show the amount of stock held by each member instead of the amount of shares and the particulars relating thereto (*vide s. 96*).

Joint holders of shares, where the articles so provide, are entitled to have their names entered in the register in whatever order they choose (48).

The register of members is the creditors' guarantee showing them to whom and to what they have to trust and must consequently be properly kept, so that the

(40) *Kent Coalfields Syndicate* [1898] 1 Q.B. 754; *vide s. 163*.

(41) For particulars to be entered where share warrants are issued, and for the bearer's right to be entered on the register, see s. 115. Where capital is converted into stock, see s. 96.

(42) *Weikersheim's case* (*supra*) at p. 836. Allotment sheets may under some circumstances be regarded as the register; *Ex. p. Cammell* [1894] 1 Ch. 528, 2 Ch. 392.

(43) *Alliance Financial Corpn.* [1866] 3 Bom. H.C.R. 166.

(44) *W. Key & Son Ltd.* [1902] 1 Ch. 467.

(45) *T. H. Saunders & Co.* [1908] 1 Ch. 415.

(46) *Vagliano Anthracite Collieries* [1910] W.N. 187, 103 L.T. 211.

(47) *Anglesea Colliery Co.* [1866] 1 Ch. App. 555.

(48) *T. H. Saunders & Co.* (*supra*); *Burns v. Siemens Bros.* [1919] 1 Ch. 225.

names appearing there are all the names of the persons really for the time being liable to the creditors (49).

As the Companies Act becomes applicable the moment a company is registered, it is necessary that until the register of members is written up, the allotment book or the list of applications should be made to serve the purpose of the register, and all the necessary particulars should be shown therein (50).

**709. Limitation:**—For a suit against a shareholder to enforce liability in respect of his shares, time runs from the date on which his name is entered on the register of members (51).

**710. Prima facie evidence:**—The register of members is *prima facie* evidence of any matter directed or authorized by the Act to be inserted therein (52). S. 153 provides that no notice of any trust express, implied or constructive shall be entered on the register. The register is not conclusive (53).

**711. Rectification of register:**—If a person who has agreed to be a member is not put on the register, the Court may rectify the register upon winding up of the company (54). A person whose name has been wrongfully removed from the register remains a member (55), and one who has not agreed to take shares is not a member even if his name is put on the register (56). If he has been induced to take the shares by misrepresentation the register may be amended under s. 155. The applicant in such a case must prove by direct evidence that the statements relied on by him were false (57). He is not entitled to rely on admissions made by the chairman or on the report of an expert employed by the company (58).

The directors can in certain circumstances, e.g., mutual mistakes, rectify the register without intervention of the Court, if the latter could under such circumstances rectify it (59). Where directors acknowledge that a shareholder is entitled to rectification of the register, they may consent to this being done without the necessity of an application to the Court (60). For cases relating to rectification of the register, see notes to s. 155.

**712. Inspection of register:**—The register is open to inspection by members *gratis* and to non members on payment of the prescribed fee, and they may make extracts (61). The motive of the party in making the extract is immaterial (62). As regards the right of a person, whether member or not, to obtain copies of the register, see s. 163 and notes thereto.

**713. Branch register:**—For provisions relating to the keeping of a branch register outside India called the "Foreign register," see ss. 157 and 158. For a company's power to close the register for not more than forty-five days in a year see s. 154.

As to the entry of stock and share warrants in the register, see ss. 96 and 115 respectively.

(49) *Ramesh v. Jogini* [1920] 47 Cal. 901 at p. 906.

(50) *Ex. p. Cammell* [1894] 2 Ch. 392.

(51) *Chota Lal v. Delsukhram* [1893] 17 Bom. 472.

(52) S. 164.

(53) *Reese River Silver Mining Co. v. Smith* [1870] L.R. 4 H.L. 67, 80; *Penhale, Lomax & Co.* [1867] 2 Ch. App. 398.

(54) *Arnot's case* [1887] 36 Ch. D. 702 at p. 707.

(55) *Barton v. London & N. W. Ry. Co.* [1889] 24 Q.B.D. 77.

(56) *Ormerod's case* [1894] 2 Ch. 474.

(57) *London Electrobuss Co.* [1906] W.N. 147, 22 T.L.R. 677.

(58) *Djambi Rubber Estate* [1912] W.N. 192; on appeal 29 T.L.R. 28, 107 L.T. 631.

(59) *Smith v. Brown* [1896] A.C. 614 (P.C.).

(60) *Anderson's case* [1869] 8 Eq. 509; compare *Indo-China Steam Navigation Co.* [1917] 2 Ch. 100.

(61) See sub-ss. (2) and (3) of s. 163.

(62) *Davies v. Gas Light & Coke Co.* [1909] 1 Ch. 248.



**151. Index of members.**—(1) Every company having more than fifty members shall, unless the register of members is in such a form as in itself to constitute an index, keep an index (which may be in the form of a card index) of the names of the members of the company and shall, within fourteen days after the date on which any alteration is made in the register of members, make the necessary alteration in the index.

(2) The index shall, in respect of each member, contain a sufficient indication to enable the entries relating to that member in the register to be readily found.

(3) The index shall, at all times, be kept at the same place as the register of members.

(4) If default is made in complying with sub-section (1), (2) or (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

This section corresponds to s. 31A of the previous Act and s. 111 of the English Act of 1948—*Notes on Clauses*.

The Joint Committee observe: "The Committee are of opinion that the index to the register of members should always be kept at the same place as the register of members. New sub-clause (3) provides for this" (*vide* J.C.R., para 64).

**152. Register and index of debenture holders.**—

(1) Every company shall keep in one or more books a register of the holders of its debentures and enter therein the following particulars, namely :—

(a) the name and address, and the occupation, if any, of each debenture holder ;

(b) the debentures held by each holder, distinguishing each debenture by its number, and the amount paid or agreed to be considered as paid on those debentures ;

(c) the date at which each person was entered in the register as a debenture holder ; and

(d) the date at which any person ceased to be a debenture holder.

(2) (a) Every company having more than fifty debenture holders shall, unless the register of debenture holders is in such a form as in itself to constitute an index, keep an index (which may be in the form of a card index) of the names of

the debenture holders of the company and shall, within fourteen days after the date on which any alteration is made in the register of debenture holders, make the necessary alteration in the index.

(b) The index shall, in respect of each debenture holder, contain a sufficient indication to enable the entries relating to that holder in the register to be readily found.

(3) If default is made in complying with sub-section (1) or (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) Sub-sections (1) to (3) shall not apply with respect to debentures which, *ex facie*, are payable to the bearer thereof.

This section is new. It provides for a register and an index being maintained in respect of debenture-holders similar to the register and index in respect of members provided for in ss. 143 and 144 (now ss. 150 and 151), having regard to the importance of debentures as a means of financing the operations of companies at the present day.—*Notes on Clauses.*

**153. Trusts not to be entered on register.**—No notice of any trust, express, implied or constructive, shall be entered on the register of members or of debenture holders, or be receivable by the Registrar.

This section corresponds to s. 33 of the previous Act and s. 117 of the English Act of 1948.—*Notes on Clauses.*

**714. Object of the section** :—The object of the section is (1) to relieve the company from taking notice of equitable interests in shares and (2) to preclude persons claiming under equitable title from converting the company into a trustee for them (63).

**715. Company recognizes no trust—equitable rights** :—Although a member is merely a trustee to the knowledge of the company, he is liable for calls and other obligations of his membership. The lien of the company will prevail over the title of the *cestui que trust* (64). But a company, which in the face of notice that the shareholder is not the beneficial owner of the shares, makes advances or gives credit to the shareholder, is not protected by the section or by the provisions to that effect in the articles of association, and the company cannot in such circumstances assert against the beneficiaries a lien on the shares for the indebtedness of the member (65). The company is not relieved from the obligation of giving effect to equitable rights of which it actually has notice, and its own lien will not take precedence of charges prior in date of which it has notice at the time of making the advance (66).

(63) Buckley, 11th ed. p. 254; see *In re Perkins* [1890] 24 Q.B.D. 613.

(64) *New London & Brazilian Bank v. Brocklebank* [1882] 21 Ch. D. 302.

(65) *Mackereth v. Wigan Coal & Iron Co.* [1916] 2 Ch. 293; *Matheron Steam Tramway Co.* [1927] 33 Bom. L.R. 184.

(66) *Bradford Banking Co. v. Henry Briggs, Son & Co.* [1886] 12 App. Cas. 29; *Hopkinson v. Rolt* [1861] 9 H.L.C. 514.

But a company is not concerned to enquire whether trustees who are registered as shareholders are acting within their powers in dealing with the shares (67), and can enforce its own rights against the persons in whose names the shares stand (68). A company lending money on the security of its shares will however be bound by constructive notice (69).

Where a company or corporation holds a number of shares in another company on behalf of its constituents, in holding their proxies it should vote according to the desire of the individual constituents although in paper the company or corporation is the shareholder. The argument that it will mean recognition of trust misconceives the whole doctrine of non-recognition of trust in company jurisprudence (70).

Under the Act a company is not entitled to make any person, other than the registered holder of a share, liable for unpaid call money thereon, on the ground that he is benamdar of such other person, even if such be the fact (71). "If the company, after receiving notice that the husband (of the registered holder) had any interest in the shares, had entered into a business transaction in respect to the shares, ignoring the rights of the husband, of which it received notice, the principle laid down in *Rainford v. James Keith & Blackman Co.* [1906] 2 Ch. 147 and *Mackereth v. Wigan Coal & Iron Co.* [1916] 2 Ch. 293 might possibly be attracted" (72). Though a company is not bound to recognize a trust in respect of its shares, yet that would not prevent a Court from recognizing such a trust in a suit in which evidence of that trust is forthcoming and from considering the rights between the parties (73). The provision as to non-recognition of trust does not preclude a *cestui que trust* from requesting the company to pay money due in respect of the shares to himself, or from suing the company in respect of misappropriation of profits to which the owner of the shares would be entitled (74).

A Receiver appointed by Court in a suit by a purchaser of shares, who had not been recognized by the company, calling upon the company to allot to him the new shares to which the vendor was entitled under s. 105 C (of the old Act, now s. 81), was not entitled to be registered as a holder of the new shares in his own name. So the company would be justified in refusing to enter his name on the register. Under the present section the company was not bound to take notice of any trust express, implied or constructive, and if the company registered the Receiver as a shareholder, it would be taking notice of the trust (75).

**716. Where vendor is a trustee for vendee :—**Shares in a limited company are capable of equitable assignment and can therefore be the subject of a trust. The right to vote which a shareholder has is a right of property annexed to the shares and transferable or assignable with the shares (76). Where a person purchased shares and after receiving his vendor's share certificates and transfer forms applies for transfer of the shares in the share register to the names of his nominees, but the directors refuse to accept the transfer, the transferor is in the position of a trustee

(67) *Simpson v. Molson's Bank* [1895] A.C. 270.

(68) *New London & Brazilian Bank v. Brocklebank* (supra); *Simpson v. Molson's Bank* (supra); *Rearden v. Provincial Bank* [1896] 1 I.R. 532 (C.A.).

(69) *Longman v. Bath Electric Tramways* [1905] 1 Ch. 646; *Mackereth v. Wigan Coal & Iron Co.* (supra).

(70) *Mahaliram v. Fort Gloster Jute Manfg. Co.* [1955] C. 132, 58 C.W.N. 715.

(71) *Murshidabad Loan Office v. Satis* [1943] C. 440, 47 C.W.N. 486 following *Chapman & Barker's case* [1867] 3 Eq. 361; *Cree v. Somerville* [1879] 4 App. Cas. 648; *Société Generale de Paris v. Walker* [1885] 11 App. Cas. 20; *In re Perkins* [1890] 24 Q.B.D. 613.

(72) *Murshidabad Loan Office v. Satis* (supra) at p. 488.

(73) *Dharwar Bank v. Mahomed Hayat* [1931] B. 269, 33 Bom. L.R. 250, 133 I.C. 241; *Mackereth v. Wigan Coal & Iron Co.* (supra).

(74) *Binney v. Ince Hall Coal & Canal Co.* [1866] 14 L.T. 392.

(75) *Venkat Rama Reddy v. Padampat* [1950] B. 76, 51 Bom. L.R. 529.

of the shares for the purchaser. The legal title to the shares is in the vendor, but the beneficial interest is transferred to the purchaser. The transferor under s. 94 of the Trusts Act (II of 1882) must comply with all reasonable directions that the transferee may give. Equity treats the purchaser as if he was the real owner and compels the registered holder to act as the agent of the beneficiary, and the latter has a right to control the exercise by the trustee of the right to vote (76). The holder of the shares is trustee not only of the corpus, but also of the income which he must pay to the beneficiary (76). The purchaser is therefore entitled as against the vendor to a restrictive injunction restraining him from attending meetings of the company and to a mandatory injunction enjoining him to sign a proxy with regard to the shares to the transferee (76).

**717. Priority of mortgages :—**As a result of this section, where there are several mortgages, the mortgagee first in date has priority, not the person who first gives notice to the company (77). Lord Esher, M. R. said: "The law has given the company the right to say 'we do not care whether you are a *cestui que trust* or not; if you are, we have a right to take no notice of you'," (78). See notes to s. 82.

But as observed by Stirling, L. J., "where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party" (79). Where the shares are equitably mortgaged or mortgaged more than once, the priority will be determined by the priorities of the assignments or mortgages, and not by the priority of the notices thereof given to the company (80).

**718. Notice :—**In order that a notice to the company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course of the transaction of its business. Casual knowledge acquired by the secretary, as an individual and not whilst he is engaged in transacting business of the company, cannot be deemed notice to the company (80).

**719. Trustee and *cestui que trust* :—**As between the trustee and the *cestui que trust*, the latter is the shareholder and is bound to indemnify the trustee against all liabilities attached to the shares (81). Although a company cannot put the *cestui que trust* on the list of contributories, it may be entitled to enforce the trustee's right to indemnity (82).

The rights of the beneficiaries are that they should be treated as though they were the registered shareholders in respect of the trust shares with the advantages and disadvantages (e.g., restrictions imposed by the articles) which would be involved in that position, and they can compel the trustees, if necessary, to use their votes as the beneficiaries (or as the Court, if the beneficiaries themselves were not in agreement), thought proper, even to the extent of altering the articles, if the trust shares carried votes sufficient for that purpose (83).

The particulars of lien also may not be entered in the register (84).

(76) *E. D. Sassoon & Co. v. Patch* [1943] 45 Bom. L.R. 46.

(77) *Société Generale v. Walker* [1885] 11 App. Cas. 20.

(78) *Re Perkins* [1890] 24 Q.B.D. 613.

(79) *Rainford v. James Keith & Blackman Co.* [1905] 2 Ch. 147, 161.

(80) *Société Générale de Paris v. Tramways Union Co.* [1884] 14 Q.B.D. 427.

(81) *Butler v. Cumpston*, 1868] 7 Eq. 16; *James v. May & West London &c. Co* [1873] L.R. 6 H.L. 328; *Hemming v. Maddick* [1872] 7 Ch. App. 395; *Hughes-Hallet v. Indian Mammoth Mining Co.* [1883] 22 Ch. D. 561; *Whittaker v. Kershaw* [1890] 45 Ch. D. 320; *Hardoon v. Belilios* [1901] A.C. 118, 124; but see *Wise v. Perpetual Trustee Co.* [1903] A.C. 139.

(82) *British Nation L. A. Assn.* [1878] 8 Ch. D. 679 at p. 708; *National Financial Co.* [1868] 3 Ch. App. 791.

(83) *Re Butt* [1952] 1 A.E.R. 167 (C.A.).

(84) *W. Key & Son* [1902] 1 Ch. 467.

**154. Power to close register of members or debenture holders.**—(1) A company may, after giving not less than seven days' previous notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members or the register of debenture holders for any period or periods not exceeding in the aggregate forty-five days in each year, but not exceeding thirty days at any one time.

(2) If the register of members or of debenture holders is closed without giving the notice provided in sub-section (1), or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits specified in that sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the register is so closed.

This section corresponds to s. 37 of the previous Act and s. 115 of the English Act of 1948. Provision has been made for penalising the company and its officers who act in disregard of the provisions of this section—*Notes on Clauses*.

**Advertisement** :—When a company kept a British register under s. 41 of the old Act, the advertisement was to be made in some newspaper circulating in the locality wherein the British register was to be kept [see sub-s. (2) of s. 42 of the old Act].

**155. Power of Court to rectify register of members.**—  
(1) If—

(a) The name of any person is, without sufficient cause, entered in or omitted from the register of members of a company ; or

(b) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member ;  
the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either reject the application or order rectification of the register ; and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved.

In either case, the Court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the Court—

(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand ; and

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908 (Act V of 1908)—

(a) If the order be passed by a District Court, to the High Court ;

(b) if the order be passed by a single Judge of a High Court consisting of three or more Judges, to a Bench of that High Court.

This section corresponds to s. 38 of the previous Act and s. 116 (1), (2) and (3) of the English Act of 1948. The provisions in the previous Act have been made clearer, in regard to the powers of the Court and also in regard to appeals. Compare sub-ss. (3) and (4) of the present section with sub-s. (3) and the Proviso to that subsection of s. 38 of the previous Act - *Notes on Clause*.

This was originally cl. 148 of the Bill, sub-s. (1) (a) of which has been altered by the Joint Committee.

**720. SUB-S. (1). Scope :-** Under this sub-section what one has to establish is some act or omission on the part of the company. It is not sufficient for a shareholder who sells his shares merely to contend or prove that there was omission on the part of the purchaser to get his name registered or impute knowledge with regard to the change of ownership of the shares to the directors or secretary of the company or merely to refer to a letter written by him to the company pointing out that he has sold his shares and that he is no longer a shareholder. He has to bring home to the company an omission which in law would amount to a sufficient cause within the meaning of sub-cl. (a) and would amount to default or unnecessary delay within the meaning of sub-cl. (b) of sub-s. (1) (85).

Cl. (a) of sub-s. (1) confers very much wider powers in the Court than cl. (b) which contemplates default or delay or omission on the part of the company. But under cl. (a) it need not be so (86). In applying s. 38 of the previous Act to the facts of a particular case the question was not merely whether there had been any default or omission on the part of the company, which would fall under cl. (b), but the question was also whether under cl. (a) the name of any person was fraudulently or without sufficient cause, entered in, or omitted from, the register of members

(85) *Jawahar Mills v. Official Receiver* [1949] 2 M.L.J. 88, [1949] M.W.N. 424, 62 M.L.W. 635.

The Court cannot take upon itself to alter the register except upon an application under this section (5).

**723. Where not :—**An application for rectification cannot be granted where there are serious disputes as to whether the company's resolution is valid and *intra vires*, and the issues cannot be properly decided in the summary proceedings under this section (6).

Alteration of the register will not however be made where the transfer is not registered owing to a decision of the directors *bona fide* come to and within their powers<sup>7</sup> that the transfer ought not to be registered (7), or if something remains to be done to complete the transfer (8), or if the articles require the directors to exercise their discretion and they have not yet done so (9). R. agreed with the directors of an assurance association to become their local manager for a particular district. As a condition of the appointment it was required that he should take 25 shares in the association. R. accordingly applied for that number of shares which were allotted to him and his name was placed upon the register, he having paid the deposit of 11. per share. He was thereupon appointed manager and notice of the appointment was given to and accepted by him: Upon these facts the Court refused to remove his name from the register (10). The Act does not contemplate the registration of the name of a firm as the holder of its shares, but only individuals or other legal entities. An application is not therefore maintainable when the transfer is made in the firm name of a partnership concern and not in the name of the individual members thereof (11).

Where a member of a club which is registered under this Act has been expelled from the club in pursuance of the authority given to the club committee by the articles of association of the club, the Court has no jurisdiction under this section to order the club to accept him as a member and to rectify the register of members accordingly. Any order to this effect amounts to interference with the internal management of the company (12).

**724. Court's power :—**This section gives an unlimited jurisdiction to the Court as to rectification of the register, though there is a discretion in the Court as to whether it ought to be exercised under the circumstances of a particular case (13). The proceedings being summary the High Court should not go into a detailed investigation into the matters alleged by one party and denied by the other (14). Where a voluntary winding up was ordered to be continued under the supervision of the Court, the Court had power to rectify the register by ordering that the name of the transferee should stand on the register and on the list of contributories where it was placed by the liquidator in place of that of the transferor (15). In the last cited case the transfer executed by the transferor and the transferee had been lodged at the office of the company for registration, the day before it stopped pay-

(5) *Damodara v. Indian National Agencies* [1945] Mad. 728, [1945] 2 M.L.J. 432, 58 M.L.W. 572.

(6) *Devakumar v. Rupak Ltd.* [1955] Pat. 486.

(7) *Alexander Mitchell's case* [1879] 4 App. Cas. 548; *Mitchell v. City of Glasgow Bank* [1879] 4 App. Cas. 624. See also *Pritam Singh v. Kotkapura Bus Synd.* [1955] N.U.C. 2501 (Pepsu).

(8) *Marino's case* [1867] 2 Ch. App. 596.

(9) *Walker's case* [1866] 2 Eq. 554; *Hackney Pavilion* [1921] 1 Ch. 276.

(10) *In re Richards* [1871] L.R. 6 C.P. 591.

(11) *Ganesh Das v. R. G. Cotton Mills Co.* [1944] O. 318, [1944] O.W.N. 436.

(12) *Querishi v. Abbottabad Club, Ltd.* [1950] Pesh. 28, Pak. Cas. [1950] Pesh. 56.

(13) *Kimberley N. B. Diamond Co.* [1888] 59 L.T. 579. *Laxminarayan v. Pragu Tools Corpn.* [1953] Hyd. 126.

(14) *Laxminarayan v. Pragu Tools Corpn.*, *supra*.

(15) *Overend, Gurney & Co.* [1867] L.R. 4 Eq. 189.

ment. In order to give jurisdiction to the Court, it is not necessary that there should be actual default in the company (16). The jurisdiction is general and not confined to cases where there has been error, mistake or default on the part of the company (17).

**725. Before and after winding up. Power is discretionary :—**The Court has power to rectify the register after (18), as well as before, a winding up order has been passed (19). In a proper case it may make the date of registration retrospective (19). But after the winding up order, it is too late to rescind a contract for taking shares on the ground of fraud, unless the contract is void *ab initio* (20), or where the holding out as a shareholder continued for a long time (21). The power is entirely discretionary, and the Court will not exercise it where the only object of the applicant is to save the expenses of taking letters of administration and of legal transfer of the shares in the applicant's name (22). It is a matter of discretion whether the Court will exercise the summary jurisdiction, and in a complicated or doubtful case the jurisdiction ought not to be exercised; but where the legal title in the applicant is clear, the order ought to be made (23). Although persons are not entitled to an order *ex debito justitiæ*, the jurisdiction under this section is unlimited, with a discretion in the Court in the circumstances of each case. "In a simple case where an immediate rectification is essential, it may be desirable to apply under this section; but if the case is complicated, an action should be brought" (24). Where a holder of shares applies to have his name removed from the register, a mortgagee of the uncalled share capital being vitally interested in the proceedings is entitled to oppose the application (25). The Court will not order a transfer to be registered, where the alleged transferor is not before the Court and there is any real doubt as to the validity or *bona fides* of the transaction (26). In exercising the discretion regard must be had to the justice of the case (27).

The Court is not bound to dismiss an application under this section as premature on the ground that there has been refusal to register by a properly constituted board of directors, and it may treat the defence set up as such refusal and deal with the application on the merits (28). An application for registration of transfer will be refused unless it is shown that the directors had acted capriciously and not honestly (29).

**726. Directors' discretion :—**Where the company by its articles has invested the directors with absolute and unqualified discretion to refuse registration without assigning any reason, the Court should not pass an order which would deprive the directors of this valuable right, unless it is proved that the exercise of the discretion

- (16) *Ex. p. Shaw* [1877] 2 Q.B.D. 463; but see *Ward & Henry's case* [1867] 2 Ch. App. 431 (judgment of Lord Cairns).
- (17) See the judgment of Turner L. J. in *Ward & Henry's case* (supra).
- (18) S. 467; *Ex. p. Ward* [1867] 16 L. T. 148; *Violet C. G. Mining Co.* [1899] 80 L.T. 684; see also *Mahaluxmi Bank v. Assam Corporated Bank*, infra.
- (19) *Sussex Brick Co.* [1904] 1 Ch. 598; *Violet C. G. Mining Co.* (supra).
- (20) *Alabaster's case* [1869] 7 Eq. 273.
- (21) *Mahaluxmi Bank v. Assam Corporated Bank* (1955) N.U.C. 3634 (Ass.).
- (22) *Ariff v. Suratce Bara Bazar Co.* [1920] 55 I.C. 751, 12 Bur. L.T. 194.
- (23) *Ex. p. Shaw* (supra).
- (24) *Per Mookerjee J.* in *Ramesh v. Jogini* [1920] 47 Cal. 901, followed in *Mohideen v. Tinnevely Mills Co.* [1928] M. 571, 28 M.L.W. 932, 111 I.C. 225.
- (25) *Ramesh v. Jogini* (supra).
- (26) *Luchmee Chand v. Bengal Coal Co.* [1882] 8 Cal. 317.
- (27) *Trevor v. Whitworth* [1888] 12 App. Cas. 409 at p. 440 (per Lord Macnaghten); *Luchmee Chand v. Bengal Coal Co.* [1882] 8 Cal. 317.
- (28) *Muir Mills Co. v. Condon* [1900] 22 All. 410.
- (29) *Mahant Kishora v. Coimbatore S. & W. Co.* [1903] 26 Mad. 79; see also *Ex. p. Penny* [1873] 8 Ch. App. 446 and *Coalport China Co.* [1895] 2 Ch. 404.



by the directors is *mala fide* (30). Where the articles give a discretionary power to the directors to refuse registration of a transfer and it appears that they have *bona fide* considered the matter, the Court will not compel them to disclose their reasons (31); but when the reasons are disclosed or evidence is produced as to the reasons, the Court can and would consider them (32). Reasons for refusing to register transfers should not be arbitrary, capricious and wanton (33). Where the directors refuse registration of transfers without assigning any reason, the Court has jurisdiction, even without reference to the directors or the company, to determine whether the transferee had a right under the articles to have his name registered (34). The powers given by the articles to the directors to refuse registration of a transfer are to be exercised in the interests of the company, and the Court will order rectification where the directors refuse registration on the mere ground that the transferor has informed them that the transfer was effected by misrepresentation (35).

A power for directors to refuse to register transfers if "in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof" only justifies "a refusal upon grounds personal to the proposed transferee (36). It does not justify refusal to register transfers of shares in small numbers, because the directors do not think it desirable to increase the number of shareholders, or because they think that the transfer is not *bona fide* but that the transferee is a mere nominee of the transferor and the transfer is made to increase the number of shareholders who will support him in a policy which the directors disapprove (36). Of course the directors are entitled to disapprove of a transferee, because they are apprehensive that his position as a shareholder may enable him to acquire, and to pass on to others, information the divulgence of which might be contrary to the interests of the company. But where the directors make up their minds without considering the personality of the transferee, it cannot be said that there has been a proper exercise of their discretion. In such cases the register would be rectified by registering the name of the transferee (36).

**727. Directors' power of rectification :—**The directors can rectify the register where the Court would under similar circumstances order rectification (37). Where the directors acknowledged that a shareholder is entitled to rectification, they may do this without the necessity of an application to the Court (38), for the company is not bound to fight every claim (39). Cancellation of shares by directors, where the shareholder has valid grounds for cancellation, is good and effectual, although the shareholder claimed such cancellation on invalid ground, not being at the time aware of the existence of valid grounds (40). If an officer of a company, under a mistake, strikes out the name of the member properly registered, this is a nullity and must be disregarded. The Court will order rectification of the register so as to "restore and retain" the name of the shareholder (41). In a recent case the Madras High Court has however held that the register of members is a public document and there is no provision in the Act which permits the directors or officers of a company to make any alteration to the register except in accordance with law

(30) Dhampur Sugar Mills (1955) N.U.C. 1907 (All)

(31) Mui Mills v. Condon (supra)

(32) Ibid & Matheson v. Nath Singh Oil Co. [1913] 18 I.C. 181.

(33) Matheson v. Nath Singh Oil Co., supra.

(34) Rajnagar Spinning & Co. v. Manilal [1912] 14 Bom. L.R. 919.

(35) Yodh Raj v. Lakshmi Insurance Co. [1935] L. 129, 152 I.C. 1005.

(36) Bede Steam Shipping Co. [1917] 1 Ch. 123.

(37) Harley's case [1875] 10 Ch. App. 157; Smith v. Brown [1896] A.C. 614 (P.C.)

(38) First National Re-insurance Co. v. Greenfield [1921] 2 K.B. 260 at p. 280.

(39) Rajnagar Spinning & Co. v. Manilal, supra.

(40) Reese River Silver Mining Co. [1867] 2 Ch. App. 604.

(41) Indo-China Steam Navigation Co. [1917] 2 Ch. 100.

(42). If members' names have been improperly added to the register, the remedy of the company is to apply to the Court under this section for the rectification of the register, and the company cannot take upon itself to alter the register (42). See also *In re Derham & Allen, Ltd.* (43) where Mr. Justice Cohen has said : "In the present case the company has taken on itself to rectify the register without any motion to the Court for that purpose, and in justification of that procedure I was referred to the judgment of Sir Georgae Jessel, M. R. in *Poole Fire Brick & Blue Clay Co.* (18 Eq. 542) affirmed in the Court of Appeal (10 Ch. App. 157) and to *Reese River Silver Mining Co. v. Smith* [(1869) L.R. 4 H.L. 64], which constitute authority for the proposition that where a person on the register of members has a right to rectification, and the company itself recognizes that right it is not essential for a valid rectification of the register that an order of the Court should be sought and obtained. I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the Court obtained in proceedings in which the right to rectification is duly established. The protection of the Court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares."

**728. Rules and formalities** :—Where a company refuses to register a transferee on account of his failure to comply with certain prescribed rules and formalities, the latter may apply for rectification. Such rules and formalities are matters which the company may or may not insist upon and it has always the right to accept such evidence as satisfies its mind that the applicant has a right to be registered (44). Where the transferee has complied with what is required of him, he is entitled to assume that the company has acted in accordance with its internal regulations so far as the sanctioning of the transfer is concerned (45). But refusal by an officer who had no authority by the articles to refuse registration is no refusal by the company (46).

**729. Estoppel of company** :—Where a company refuses registration of a transfer alleging that it has a lien on the shares, it is estopped if it had recognized a previous transfer (45).

**730. Where winding up intervenes** :—Where the winding up order had intervened whereby the rights of creditors were made paramount, application for rectification must be refused, even in a proper case for such rectification on the ground of repudiation of the shares (47). But where a shareholder having sold his shares applies to the company for registration of the transfer, but before registration the company goes into liquidation, the shareholder is entitled to have the transferee's name entered in his place as contributory, if he shows sufficient cause, or default or unnecessary delay on the part of the company in entering that fact on the register (48).

If the contract under which the shares have been taken is void and not merely voidable, the name against which the shares stand may be removed even after winding up has commenced (49). But where the removal of a member's name was in consequence of an invalid surrender, it was replaced even after a lapse of seven years (50).

**731. Fraud or misrepresentation** :—A member can get his name removed from the register on the ground that he was induced to take the shares by fraud or

(42) *Damodara v. Indian National Agencies* [1945] Mad. 728, [1945] 2 M.L.J. 432, 58 M.L.W. 72.

(43) [1945] 173 L.T. 281.

(44) *Union Indian Sugar Mills Co. v. Jai Deo* [1922] 44 All. 151.

(45) *Matheson v. Nath Singh*, *supra*.

(46) *Bahadur v. Shiam* [1914] 36 All. 365.

(47) *Land Loan & Co. of South Africa* [1885] 52 L.T. 501.

(48) *Indian Specie Bank* [1915] 17 Bom. L.R. 342.

(49) *Alabaster's case* (*supra*).

(50) *Bellerby v. Rowland & Co.* [1902] 2 Ch. 14.

misrepresentation in the prospectus (51), provided that the application is made within a reasonable time and before winding up has commenced (52), and proper material has been placed before the Court (53). A person who claims to have been misled by fraud or false representation into taking shares should raise the objection without delay (54). But see the under-noted case (55) where it has been held that a mere delay in applying is itself not a ground for refusal to order the register to be rectified. Where a shareholder does not take action for a long time, e.g., seven years, to have his name expunged from the register of members, his right to do so would be barred (56). In the case of *Scottish Petroleum Co.* (57) Lord Justice Baggallay said: "The delay of a fortnight in repudiating the shares makes it to my mind doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed as in *Central Railway Co. of Venezuela v. Kish* (58). But where, as in the present case, the shareholder is at once fully informed of the circumstances he ought to lose no time in repudiating." If knowing that his name is included in the register of members he stands by, he loses his right to have his name removed. It makes no difference in principle whether he applies for the shares or he is included as a transferee, if he has assented to his name being included amongst the shareholders (59). On an application for rectification on the ground of misrepresentation in the prospectus by the omission to disclose certain facts, it is not enough for the applicant to show mere non-disclosure of the facts; he must show that if the facts had been disclosed it would falsify some statement in the prospectus (60). If the time between the discovery of the true state of things and the repudiation be too long, the Court will not grant the application for rectification (60).

**732. Necessary parties :—**In an application under this section the company, and not the directors, is the necessary party even if the latter have exceeded their powers in refusing to register a transfer (61). The power given to the Court by this section is discretionary, and the Court will not order a transfer to be registered where the alleged transferor is not before the Court, and there is any real doubt as to the validity or *bona fides* of the transaction (62).

**733. Jurisdiction. Appointment of Receiver :—**The jurisdiction of the Court under this section is a limited one. The only relief that can be granted under this section is the one concerning rectification of the register and in some cases payment by the company of damages sustained by any party aggrieved (63). The Court cannot grant any relief under this section regarding the management of the property of the company or for conducting its business. It has therefore no jurisdiction to appoint a Receiver to take over the management and business of the company and also to take over possession of its property pending the decision of the application under this

(51) *London & Staffordshire &c. Co.* [1883] 24 Ch. D. 149.

(52) *Muir v. City of Glasgow Bank* [1879] 4 App. Cas. 337; *Tennent v. Glasgow Bank* [1879] 4 App. Cas. 615.

(53) *Sadiq v. Mumtaz Bank* [1929] L. 556, 123 I.C. 92.

(54) *Jagannath v. Gopichand* [1915] 29 I.C. 770, 110 P.L.R. 1915.

(55) *Mahadevi v. Motiram* [1939] Pat. 603, 20 P.L.T. 703.

(56) *Peoples Bank of N. India* [1936] L. 700.

(57) [1883] 23 Ch. D. 413 (434).

(58) [1867] L.R. 2 H.L. 99.

(59) *In re D' Cruz* [1939] M. 803.

(60) *Christineville Rubber Estate* [1911] W.N. 216, 106 L.T. 260.

(61) *Keith, Prouse & Co.* [1918] 1 Ch. 487; unless the directors are joined at their own request, the Court has no jurisdiction to make a punitive order against them for payment of the costs of the motion. See also *In re Jagadhri Light Ry. Co.* [1946] L. 193, 48 P.L.R. 1.

(62) *Luchmee Chand v. Bengal Coal Co.* [1882] 8 Cal. 317; *Jawahar Mills v. Official Receiver* [1949] 2 M.L.J. 88, [1949] M.W.N. 424, 62 M.L.W. 635.

section. The provisions of Or. 40, r. 1 read with s. 141, C. P. Code cannot be applied to an application under the present section (63).

The Court will interfere and rectify the register upon a motion under this section, where the error is due to the neglect or default of the company, and generally where the question arises between the company and a member or an alleged member as to whether his name has been properly included or excluded (64). But where a third party is affected, the Court will not exercise its jurisdiction under this section. The applicant in such a case must bring an action to which the third person may be made a party (65).

**734. Rectification : how effected :—**Where the Court orders the register to be rectified by removing a name from it, the name should not be erased ; it should be pencilled through and an abstract of the order signed by the secretary should be added (66). An order to put the transferee's name on the register is necessarily an order to take the transferor's name off. An order for rectification cannot be made in an action to which the transferor is not a party (67).

**735. Procedure :—**The normal practice is for the application for rectification of the register of members to be made by motion (68). All applications for leave to rectify the share register must be made on notice to the company and in case of transfer of shares to the transferor or the transferee as the case may be.

**735A. Summary procedure :—**This section has been deliberately enacted as a summary procedure where in non-controversial matters the Court would come to a quick decision however irreparable may the injury be to the petitioner. But where there is any controversy under several heads and a regular investigation is necessary, this section ought not to be allowed to be used and the party should be directed to proceed by a regular suit (69).

**736. Damages :—**A company is liable to pay damages to a person for any loss he may have sustained by its neglect or refusal to do its duty in respect of the entries in the register of members (70). But if the order for rectification is refused, the Court cannot give damages upon a motion under this section, the proper course being for the aggrieved person to bring an action (71).

Where a person is suing for rescission, the Court can on terms, *e.g.*, upon giving the usual undertaking to pay damages and paying into Court the amount of the call with interest, restrain the company from forfeiting the shares pending the hearing of the case (72) ; but this is not necessarily a condition precedent to the granting of an injunction.

In an action for damages against a company on the ground of some alleged breach of duty in removing the plaintiff's name from the register, the person whose name has been substituted need not, and indeed ought not to, be joined as a defendant, the claim being not for rectification of the register (73).

(63) *In re Jagadhri Light Ry. Co.*, *supra*.

(64) *Reese River Silver Mining Co. v. Smith* [1869] I.R. 4 H.L. 64.

(65) *Great Britain Re-insurance Co.* [1920] 124 L.T. 194.

(66) *Iron Shipbuilding Co.* [1865] 34 Beav. 597.

(67) *Ontario Jockey Club v. Mc Bridge* [1927] A.C. 916 (P.C.).

(68) *Duffin v. Mexican &c. Reduction Co.* [1890] W.N. 116.

(69) *Savitadevi v. Harinagar Sugar Mills* [1955] N.U.C. 4833 (Bom.). See also *Devakumar v. Rupak Ltd.* [1955] Pat. 486.

(70) *Tomkinson v. Balkis Consolidated Co.* [1891] 2 Q.B. 614 ; *Ottos Kopje Diamond Mines* [1893] 1 Ch. 618.

(71) *Ottos Kopje &c. Mines* (*supra*).

(72) *Lamb v. Sambas Rubber &c. Co.* [1908] 1 Ch. 845 ; *Jones v. Pacaya Rubber Co.* [1911] 1 K.B. 455.

(73) *Lovibond v. Grand Trunk Ry. Co.* [1936] 163 I.C. 547 (P.C.).

**737. Date of taking effect :—**In ordering rectification of the register under this section, whether the company is in liquidation or not, the Court has power in a proper case to fix a particular date at which the registration shall be operative, even to the extent of making it retrospective but subject, if necessary, to conditions protecting the rights of third persons (74). The rectification takes effect from the date when the mistake was committed unless the Court orders otherwise (75). Where the shares were forfeited and the shareholder's name was expunged from the register of members and on an application under s. 38 of the old Act the Court held that the forfeiture was invalid and ordered rectification of the register, all the rights and obligations of the shareholder were revived (75).

**738. Estoppel of allottee :—**Once the shares have been registered in the name of the allottee and he has done acts only consistent with his being a member, he will be taken to have agreed to take the shares and will be estopped from denying that he has so agreed, for the law recognizes that observance of formalities may be dispensed with, and irregular, as distinguished from void, transaction may be confirmed (76). But even where the agreement is void, if the applicant's name is put on the register and he with full knowledge of all the facts does acts that are only consistent with his being a shareholder, he will be bound as such. In such a case the placing of the applicant's name on the register would seem to amount to an offer and the acts done to be an acceptance of the offer. The position of a person who agreed to take shares upon special conditions depends upon determination of the question whether the conditions are conditions precedent or conditions subsequent. In the latter case, or where the conditions precedent have been waived, the applicant becomes a shareholder (76). If the allottee transfers his shares, attends meetings or accepts dividends, he will be bound by his acts and cannot rely upon non-performance of the condition precedent (77).

Mere waiver, acquiescence or laches not amounting to an abandonment of the right or to an estoppel against a person will not disentitle him from claiming relief in equity in respect of his executed and not merely executory contract (78). A party cannot challenge the form of order under this section, to which his counsel consented. An affidavit of the senior Advocate should be filed before the trial Court for rectification of an alleged wrongly recorded order of the trial Court (78).

Where the conduct of the shareholder amounts to standing by to see whether the company would ultimately turn out profitable, he will not be entitled to relief, especially where the company had parted with the forfeited shares to others on the footing that the forfeiture was valid. Where such a shareholder was a private limited company consisting of two members and at the date of forfeiture the company had been removed from the register under s. 247 of the old Act and the two members merely stood by without taking any steps to restore the company and to question the validity of the forfeiture for nearly five years, the company was affected by the conduct of its shareholders and was disentitled to claim rectification of the register (79).

**739. Section is not exhaustive :—**This section is not exhaustive and does not negative all alterations of the register except those referred to in the section.

Where shares stand in the names of two trustees jointly, they are entitled to have their names in different orders and the register may be altered accordingly (80).

(74) *Sussex Brick Co.* [1904] 1 Ch. 598; *Mahaluxmi Cotton Mills* [1955] N.U.C. 399 (Cal.), 57 C.W.N. 102.

(75) *Panna Lal v. Jagatjit Distillery & Co.* [1952] Pepsu. 92.

(76) *Piara Singh v. Peshwar Bank* [1915] 28 I.C. 53.

(77) *Piara Singh v. Peshawar Bank* [1915] 28 I.C. 53.

(78) *Sha Mulchand & Co. v. Jawahar Mills* [1953] S.C. 98.

(79) *Jawahar Mills v. Official Receiver* (supra).

(80) *Burns v. Siemen Bros. Dynamo Works* [1919] 1 Ch. 225, [1918] 2 Ch. 324.

**740. Separate suit :—**This section is widely worded and it is a matter of discretion for the Court whether in any particular case it would hear the petition or leave the parties to a separate suit (81). An application under this section was entertainable when no complicated question of law or title was involved (82). The remedy of a transferee of share was not limited to an application under s. 38 of the old Act ; but he had the right to bring a suit to get his name registered, and where the case was a complicated one, an action should be brought (83).

**741. Suit for declaration :—**Where in a suit for declaration to the effect that the plaintiffs were not shareholders and directors of a company, it appeared that the plaintiffs substantially asked for all the reliefs to which they were entitled, it was held that as no money had been paid by the plaintiffs, a prayer to the effect that the register of members might be rectified by the removal of the plaintiffs' names therefrom, would merely be a prayer for nominal relief and hence the objection to the maintainability of the suit in a declaratory form was without any substance (84).

**742. Proviso to sub-s. (3) of s. 38 of the old Act. Appeal :—**This proviso was not in the English Act. It has been omitted in the present section. The proviso was not confined to the last clause, but was a general reservation imposed on all the clauses (85). Having regard to the fact that under the proviso an appeal was allowed from the decision of an issue directed to be tried, it was necessary that there should be a clear direction as to the trial of an issue, so that there might be no obscurity on the point and no room for the argument that there was no issue directed to be tried and consequently no right of appeal (85). Under s. 58 of Act VI of 1882, which corresponded to this section, it was held that there was no reason for confining the last sentence, *viz.*, "and an appeal in the manner directed by the Code of Civil Procedure shall lie," to the case in which an issue had been directed upon a question of title (86). But in view of the altered language of the section *Amrita v. Shrish* (86) was, it is submitted, no longer an authority for the proposition that an appeal lay although no issue had been directed upon a question of title.

An appeal under the Proviso to s. 38 of the old Act had to be treated as equivalent to one filed under s. 100, C. P. Code. A finding fairly reached on the evidence would, therefore, be binding. But where the Judge, in allowing the application for rectification of the register, reached his decision after placing the onus wrongly the decision was open for further consideration (87). In such a case the onus was on the shareholders to prove that the action of the directors in refusing to register the transfer of shares was *mala fide* (87).

**743. Serious questions of title :—**In proceedings under the section the Court is not bound to decide serious questions of title, but where it elects to decide the question, it may either decide it itself, or send it to somebody else in the form of an issue, but the decision of the issue in either case is the decision of the Court

- (81) Mathern Steam Tramway Co. [1927] 33 Bom. L.R. 184 ; Phillipose v. Vanchinad Rubber Produce Co. [1953] Tr-Coch 253 ; Laxminarayan v. Pragu Tools Corp. [1953] Hyd. 126 ; Mahadeo v. New Darjeeling Union Tea Co. [1952] C. 58.
- (82) Panna Lal v. Jagatjit Distillery & Co. [1952] Pepsu. 47
- (83) Mahadeo v. Darjeeling Tea Co. [1951] 55 C.W.N. 408 following Ramesh v. Jogini [1923] 47 Cal. 901 and Mohideen v. Tinnevely Mills Co. [1928] M. 571.
- (84) Mutual Bank of India v. Sohan Singh [1936] L. 790, 161 I.C. 952 ; but see Jogesh v. Durga Mohan [1932] C. 714, 36 C.W.N. 638, 140 I.C. 76.
- (85) Amrita v. Shrish [1899] 26 Cal. 944 ; Manilal v. Gordhan Spinning & Co. [1917] 41 Bom. 76.
- (86) Amrita v. Shrish [1899] 26 Cal. 944.
- (87) Balwant Transport Co. v. Despande [1956] N. 20, relying upon Peddi Reddi v. Chennabi Reddi [1929] P.C. 13 and Jogesh v. Emdad [1932] P.C. 28.

and is appealable (88). The jurisdiction of the Civil Court to decide the question falling within the purview of this section is not excluded (89). For further cases see notes to s. 82.

**744. Limitation** :—An action under this section for rectification of the register does not fall within the purview of either Art. 48 or Art. 49 of the Limitation Act, as such an action is not for detinue or trover, though a share in a company is movable property under s. 82 of the present Act. In the absence of any specific Article, the only alternative is to apply the residuary Article 120 of the Limitation Act (90). As to when the period of limitation begins to run see *Mahadeo v. New Darjeeling Union Tea Co.* below (90). A claim for rectification of register *simpliciter* under this section does not involve a claim for return of share scrips. Arts. 48 and 49 of the Limitation Act do not apply, nor does Art. 181, Art. 120 applied (91). Where a period of limitation is prescribed for a suit or proceeding, mere delay is no bar, unless it is of such a character as to lead to an inference of abandonment of the right or unless it is established that the person against whom the action or proceeding is instituted was actually prejudiced by reason of such delay (90).

**745. Costs** :—This section in India gives wide discretion in the matter of costs (92).

**746. After winding up order** :—An application under this section in which the company is respondent is a proceeding against the company within s. 446 and requires leave of the Court; but with leave the section will apply against the company after winding up (93).

For the question of rectification after winding up see notes to s. 467.

**156. Notice to Registrar of rectification of register.**—In the case of a company required by this Act to file a list of its members with the Registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the Registrar within fourteen days from the date of the making of the order.

This section corresponds to s. 39 of the previous Act and s. 116 (4) of the English Act of 1948—*Notes on Clauses*.

**Form** :—For the form of notice of rectification of the register of members, under this section, see Form No. 21 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

### *Foreign registers of members or debenture holders*

**157. Power for company to keep foreign register of members or debenture holders.**—(1) A company which

(88) *Union Indian Sugar Mills Co. v. Jai Deo* [1922] 44 All. 151 at p. 154; see *Greater Britain P. D. Corp'n.* [1924] 40 T.L.R. 488.

(89) *Indian Merchants Bank v. Jogindra Singh* [1928] L. 234, 108 I.C. 192; *Ex. p. Shaw* [1877] 2 Q.B.D. 463.

(90) *Jawhar Mills v. Official Receiver* [1949] 2 M.L.J. 88, [1949] M.W.N. 424, 62 M.L.W. 635; *Phillipose v. Vanchinad Rubber Produce Co.* [1953] Tr-Coch 253; *Mahadeo v. New Darjeeling Union Tea Co.* [1952] C. 58.

(91) *Sha Mulchand & Co. v. Jawahar Mills* [1953] S.C. 98.

(92) *Mahadevi v. Motiram* [1939] Pat. 603, 20 P.L.T. 703.

(93) *Onward Building Society* [1891] 2 Q.B. 463.

has a share capital or which has issued debentures may, if so authorised by its articles, keep in any State or country outside India a branch register of members or debenture holders resident in that State or country (in this Act called a "foreign register").

(2) The company shall, within one month from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within one month from the date of such change or discontinuance, as the case may be, file notice with the Registrar of such change or discontinuance.

(3) If default is made in complying with the requirements of sub-section (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

SS 157 and 158 correspond to ss. 41, 42 and 42A of the previous Act and ss. 119 to 120 of the English Act of 1948. As recommended in the C.L.C.R. (page 240) the sections have been made applicable to all foreign countries instead of being confined to the United Kingdom and Burma, as the previous Act did. The provisions have been extended to debenture-holders also—*Notes on Clauses*.

**158. Provisions as to foreign registers.**—(1) A foreign register shall be deemed to be part of the company's register (in this section called the "principal register") of members or of debenture holders, as the case may be.

(2) A foreign register shall be kept, shall be open to inspection and may be closed, and extracts may be taken therefrom and copies thereof may be required, in the same manner, *mutatis mutandis*, as is applicable to the principal register under this Act, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the district wherein the foreign register is kept.

(3) (a) The Central Government may, by notification in the Official Gazette, direct that the provisions of clause (b) shall apply, or cease to apply, to foreign registers kept in any State or country outside India.

(b) If a foreign register is kept by a company in any State or country to which a direction under clause (a) applies for the time being, the decision of any competent Court in that State or country in regard to the rectification of the register



shall have the same force and effect as if it were the decision of a competent Court in India.

(4) The company shall—

(a) transmit to its registered office in India a copy of every entry in any foreign register as soon as may be after the entry is made; and

(b) keep at such office a duplicate of every foreign register duly entered up from time to time.

(5) Every such duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(6) Subject to the provisions of this section with respect to duplicate registers, the shares or debentures registered in any foreign register shall be distinguished from the shares or debentures registered in the principal register and in every other foreign register; and no transaction with respect to any shares or debentures registered in a foreign register shall, during the continuance of that registration, be registered in any other register.

(7) The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company in the same part of the world or to the principal register.

(8) Subject to the provisions of this Act, a company may, by its articles, make such regulations as it thinks fit in regard to its foreign registers.

(9) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

See notes to the last section.

This was originally cl. 151 of the Bill, sub-cl. (3) of which has been altered by the Joint Committee.

### *Annual Returns*

**159. Annual return to be made by company having a share capital.—**(1) Every company having a share capital shall, within forty-two days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on that day, regarding—

- (a) its registered office,
- (b) the register of its members,
- (c) the register of its debenture holders,
- (d) its shares and debentures,
- (e) its indebtedness,
- (f) its members and debenture holders, past and present, and
- (g) its directors, managing directors, managing agents, secretaries and treasurers and managers, past and present.

(2) The said return shall be in the Form set out in Part II of Schedule V or as near thereto as circumstances admit :

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the list referred to in paragraph 5 of Part I of Schedule V shall state the amount of stock held by each of the members concerned instead of the shares so converted previously held by him.

This section corresponds to sub-ss. (1) and (2) of s. 32 of the previous Act and s. 124 of the English Act of 1948. The detailed provisions contained in s. 32 (2) of the previous Act have been taken over and incorporated in Schedule V. That Schedule as recommended by the C. I. C. embodies all the provisions contained in the corresponding Schedule of the English Act, *viz.*, the Sixth Schedule. The annual return will cover the register of debenture-holders also—*Notes on Clauses*. In sub-s. (1) the Joint Committee have raised the time limit from 21 days to 42 days (*vide* J.C.R., para 65).

In sub-s. 1 (g) the words "secretaries and treasurers" have been added by the Joint Committee.

**747. Cash** :— The word "cash" means such a transaction as would, in an action at law for calls, support a plea of payment, as Lord Macnaghten observed in *Larocque v. Beauchemin* (94): "If a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money *at once* for the purchase of the property, and on the other side a *bona fide* liability to pay money *at once* on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property; it appears to me that the Act does not make necessary that the formality should be gone through of money being handed over and taken back again." For other cases see notes to s. 75.

**748. Discount** :— Shares cannot be issued at a discount (95), even by way of compromise (96), or in any other indirect way (97). If an arrangement for the issue of shares is such that in the course of its due working out there is as much as a pos-

(94) [1897] A.C. 358 (P.C.).

(95) *Ooregum Gold Mining Co. v. Roper* [1892] A.C. 125.

(96) *Mother Lode Gold Mines v. Hill* [1903] 19 T.L.R. 341.

(97) *Moseley v. Koffyfontein Mines* [1904] 2 Ch. 108; *Famatina D. Corporation v. Bury* [1910] A.C. 439.

sibility that in the result the shares will have been issued at a discount, then the issue of the shares as fully paid cannot be justified (98).

**749. Lump sum :—**To insert a lump sum in the summary or balance-sheet for goodwill, trade marks, machinery, furniture and fixtures without giving the separate values for each class is not a compliance with the law (99). Where the company has converted any of its shares into stock, the list must show the amount of stock held by each member instead of the amount of shares and particulars relating thereto (s. 96).

**160. Annual return to be made by company not having a share capital.—**(1) Every company not having a share capital shall, within forty-two days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return stating the following particulars as they stood on that day :—

- (a) the address of the registered office of the company;
- (b) all such particulars with respect to the persons who, at the date of the return, were the directors of the company, its managing agent, its secretaries and treasurers and its manager as are set out in section 303.

(2) There shall be annexed to the return a statement containing particulars of the total amount of the indebtedness of the company as on the day aforesaid in respect of all charges which are or were required to be registered with the Registrar under this Act or under any previous companies law, or which would have been required to be registered under this Act if they had been created after the commencement of this Act.

This section is new. It provides for annual return being made by a company not having a share capital on the lines of s. 125 of the English Companies Act of 1948 as recommended by the C. L. C. at page 238 of their Report—*Notes on Clauses*.

**161. Further provisions regarding annual return and certificate to be annexed thereto.—**(1) The copy of the annual return filed with the Registrar under section 159 or 160, as the case may be, shall be signed both by a director and by the managing agent, secretaries and treasurers, manager or secretary of the company, or where there is no managing agent, secretaries and treasurers, manager or secretary, by two directors of the company, one of whom shall be the managing director where there is one.

(98) *Trustees' Corpn. v. Commissioners of Income Tax* [1930] P.C. 151, 54 Bom. 437, 34 C.W.N. 709, 57 I.A. 152.

(99) *Galloway v. Schill, Seeborn & Co.* [1912] 2 K.B. 354.

(2) There shall also be filed with the Registrar along with the return a certificate signed by both the signatories of the return, stating—

(a) that the return states the facts as they stood on the day of the annual general meeting aforesaid, correctly and completely; and

(b) in the case of a private company also, (i) that the company has not, since the date of the annual general meeting with reference to which the last return was submitted, or in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and (ii) that, where the annual return discloses the fact that the number of members of the company exceeds fifty, the excess consists wholly of persons who under sub-clause (b) of clause (iii) of sub-section (1) of section 3 are not to be included in reckoning the number of fifty.

This section corresponds to sub-ss. (3) and (4) of s. 32 of the previous Act and ss. 126 and 127 of the English Act of 1948—*Notes on Clauses*. In sub-s. (1) the words "secretaries and treasurers" have been inserted by the Joint Committee.

See Notes to s. 159.

**162. Penalty and interpretation.**—(1) If a company fails to comply with any of the provisions contained in sections 159, 160, or 161, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

(2) For the purposes of this section and sections 159, 160, and 161, the expressions "officer" and "director" shall include any person in accordance with whose directions or instructions the Board of directors of the Company is accustomed to act.

This section corresponds to s. 32 (5) of the previous Act and ss. 124 (3), 125 (3), 126 (2) and 126 (3) of the English Act of 1948. Sub-s. (2) corresponds to s. 32 (5) of the previous Act and ss. 124 (3) (4), 125 (3) (4), 126 (2) and 127 (3) of the English Act of 1948—*Notes on Clauses*.

**750. Default** :—It is no defence to a charge under this section that there was no general meeting held, the persons charged having been themselves parties to the default in holding the general meeting (1). It is clearly the duty of the directors to see that the particular returns, the list and the summary under this section and the

(1) *Park v. Lawton* [1911] 1 K.B. 588. The default must however be found as a fact—see *Surendra v. Emp.* [1941] 45 C.W.N. 1130, see notes to s. 166 *post*.

copies of the balance sheet and profit and loss account are submitted under s. 220 *post*. It is not open to any director to plead that he had no real control of the affairs of the company or that he was a mere figure-head and that he did not wilfully permit the default. The law presumes that the directors know their duties, and if they make no attempt to see that those duties are carried out, the Court is justified in holding that the directors wilfully and knowingly permit the company to fail to carry out those duties. The fact that owing to their previous default it was impossible for the directors to comply with the requirements of the statute would not absolve them from liability. It is not necessary that there should be fraud or dishonesty on the part of the directors, nor can it be said that because the default is of a technical nature a nominal sentence is called for (2). It is not correct to say that a director who is guilty of a default under this section should be punished with a nominal sentence in the absence of dishonesty or fraud on his part (2). But a continuing daily fine may not be imposed where owing to no meeting having been held it is not possible to remedy the default (3). If default is made in holding the general meeting and in filing the return, penalties are incurred under this section as well as under s. 168 (4). The word "default" is a word of general import and includes failure or omission (5). "Default" implies a wilful continued neglect to do an act required to be done. A statutory offence is committed where the transaction is not *malum in se* (5). While a company is always liable where a return is not sent to the Registrar as required by this section, the officers of the company are liable only if they *knowingly or wilfully* authorise or permit the default (6). An officer cannot be convicted under this sub-section unless it is found that he knowingly and wilfully authorized or permitted the default. He cannot be convicted in respect of purely arithmetical mistakes, especially when previous returns have not been held and proved to be correct (7).

It is the bounden duty of a company and its directors and managers to forward to the Registrar the summary and the list specified in the section (8), and the obligation does not come to an end on the date on which by default the penalty begins to accrue. Therefore all persons, who at any time during the default in complying with the provisions of this section acted as directors or managers, are liable to be convicted and it is immaterial that some or all of them were not legally qualified to act as directors or managers until after the date when the penalty first accrued (9). The fact that the managing directors and the secretary had resigned their positions before the prosecution for the non compliance with the provisions of the section was started, does not free them from their liability (10).

In order that a conviction under s. 32, s. 77 (10) and s. 134 (4) of the old Act of an officer might be sustained, the only thing the prosecution had to prove was that that particular officer knowingly and wilfully authorized or permitted these

(2) *Bhagirath v. Emp* [1948] 48 Cr. L.J. 236, 229 I.C. 109, [1948] C. 42. See also *Viswanathan v. Ass. Registrar* [1953] M. 558, [1953] Cr. L.J. 1062; *In re G. Appayya* [1952] M. 800

(3) *Dorté v. South African Supereration* [1904] 20 T.L.R. 425.

(4) *Ibid*; *Gibson v. Barton* [1875] 10 Q.B. 329.

(5) *Garrard v. James* [1925] Ch. 616 at p. 622.

(6) *Public Prosecutor v. Lury & Co.* [1941] 2 M.L.J. 487, [1941] M.W.N. 846 approving *Bhaskaradu v. Subbarayudu* [1914] 38 Mad. 674; *Bankat Lal v State* [1954] Hyd. 49.

(7) *Lakshmana v. Emp.* [1932] M. 497, [1932] M.W.N. 1157, 138 I.C. 317.

(8) *Debendra v. Registrar* [1918] 45 Cal. 490.

(9) *Totaram v. Emperor* [1916] 17 Cr. L.J. 242, 34 I.C. 262. See also *R. v. Tyler* [1891] 2 Q.B. 588. The word "manager" includes a manager *de son tort*: *Gibson v. Barton* (supra); *R. v. Lawson* [1905] 1 K.B. 541; *Coventry & Dixon's case* [1880] 14 Ch. D 660; *Edmonds v. Foster* [1875] 33 L.T. 690.

(10) *Chhabil Das v. Emp.* [1914] 15 Cr. L.J. 300, 23 I.C. 508.

defaults. S. 32 of the old Act spoke also of authorisation of those defaults, but it was not necessary to prove that, as the offence was also complete if the officer had known of the defaults and permitted the defaults (11). The burden of proof that the list of shareholders was forwarded to the Registrar in time is on the company. The liability of the directors however depended on their knowingly and wilfully withholding the list (12). When repeated reminders were addressed by the Registrar to the managing director, it could be presumed that the default was committed by him knowingly and wilfully (12).

**751.** SS. 76 and 133 of the old Act created two distinct offences, one for not holding the general meeting and another for not laying the balance-sheet before the general meeting. The former offence might give rise to the latter or even independently of it. Hence, there was no case of the accused being prosecuted twice for the same offence and put in double jeopardy (13).

The fact that after a prosecution has been instituted against the directors for breach of the provisions of this section and s. 220 the company has gone into liquidation does not render the leave of the Court necessary under s. 446 *post*. S. 446 would not operate as a bar to the prosecution in such cases (2).

As to the penalty for wilfully making a statement which is false in a material particular, see s. 628.

For the form in which the annual list and summary must be made, see Schedule V.

As to the right of a person to obtain copies of the list and summary see s. 163.

**752. Magistrate's power and jurisdiction :—**The forwarding to the Registrar of the list and summary, which upon the face of them purport to satisfy the requirements of the Act, is not a sufficient compliance with the section, unless such a list and summary are in accordance with the facts, and the Magistrate has jurisdiction to enquire into the truth or falsehood of the statements contained therein (14). But questions of nicety as to the title to shares and the right to be on the register cannot properly be determined by the Magistrate, and with reference to such questions he ought to accept the company's register as practically conclusive (14). A charge under this section cannot be sustained, unless there is evidence that the previous return is correct, because otherwise one must arrive at the conclusion that if there is any mistake in one year it cannot be corrected in the next (15).

A Presidency Magistrate has jurisdiction under s. 182 Cr. P. C. to try an offence under this section, and even if he has not, s. 531 Cr. P. C. cures the defect (16).

### *General provisions regarding registers and returns*

**163. Place of keeping, and inspection of, registers and returns.—**(1) The register of members commencing from the date of the registration of the company, the index of members, the register and index of debenture holders, and copies of all annual returns prepared under sections 159 and 160, together

(11) *Ballav Das v. Mohan Lal* [1936] C. 237, 39 C.W.N. 251, 162 I.C. 282; see also *Lakshmana v. Emp.* (supra); *Sundar Das v. Emp.* [1929] L. 836, 10 Lah. 521.

(12) *Bankat Lal v. State*, supra.

(13) *Viswanathan v. Asst. Registrar* [1953] M. 558, [1953] Cr. L.J. 1062.

(14) *Briton Medical & General Life Assn.* [1888] 38 Ch. D. 61; *Lakshmana v. Emp.* [1932] M. 497, 35 M.L.W. 66.

(15) *Lakshmana v. Emp.* (supra).

(16) *Debendra v. Registrar* [1918] 15 Cal. 490.

with the copies of certificates and documents required to be annexed thereto under sections 160 and 161, shall be kept at the registered office of the company.

(2) The registers, indexes, returns, and copies of certificates and other documents referred to in sub-section (1) shall, except when the register of members or debenture holders is closed under the provisions of this Act, be open during business hours (subject to such reasonable restrictions, as the company may impose, so that not less than two hours in each day are allowed for inspection) to the inspection—

(a) of any member or debenture holder, without fee ; and

(b) of any other person, on payment of a fee of one rupee for each inspection.

(3) Any such member, debenture holder or other person may—

(a) make extracts from any register, index, or copy referred to in sub-section (1) without fee or additional fee, as the case may be ; or

(b) require a copy of any such register, index or copy or of any part thereof, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(4) The company shall cause any copy required by any person under clause (b) of sub-section (3) to be sent to that person within a period of ten days, exclusive of non-working days, commencing on the day next after the day on which the requirement is received by the company.

(5) If any inspection, or the making of any extract required under this section, is refused, or if any copy required under this section is not sent within the period specified in sub-section (4), the company, and every officer of the company who is in default, shall be punishable, in respect of each offence, with fine which may extend to fifty rupees for every day during which the refusal or default continues.

(6) The Court may also, by order, compel an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it, or that the copy required shall forthwith be sent to the person requiring it, as the case may be.

This section corresponds to ss. 36 and 125 of the previous Act. The provisions have been generalised so as to be applicable not only to the register of members but

also to the register of debenture-holders and annual returns including the documents etc. annexed to those returns—*Notes on Clauses*.

The Joint Committee have made some changes in this section with the following observation: "The Committee are of opinion that it will be sufficient to make copies of the annual returns and other documents, instead of the originals themselves, available for the inspection of the persons concerned and have amended the clause accordingly" (*vide* J.C.R., para 66).

**753. Inspection of register of members :**—Where a person, entitled to obtain inspection of the register, applies for inspection during business hours, such inspection must be granted (17), and even a temporary refusal, based upon grounds of convenience to the company's business, will render a director liable to the penalty (18). The right to inspect the register of members carries with it a right to take extracts from or to make copies of the entries in the register. The right to require a copy of the register on payment is in addition to and not in substitution for the above implied right (19).

The register includes the entries of the names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or otherwise (20).

**754. Object is immaterial :**—Object of inspecting the register is immaterial ; for even if it be known that the object is antagonistic to the company, it is illegal to refuse inspection or copy (21).

**755. Right to inspect :**—The right to inspect ceases upon the commencement of winding up (22), and if inspection is required after that, an order of the Court must be obtained under s. 549. Such an order entitles the party to inspect and take copies himself (23). He need not pay the liquidator a fee for having the copies made (24). The result of authorities as to the nature and extent of the common law right which any member of a corporation has to inspect the documents of the corporation is that the privilege of inspection is confined to cases where the member has in view some definite rights or object of his own and to those documents which would tend to illustrate such right or object (25).

**756. Inspection and copies. Court's jurisdiction :**—Where the Act gives right to have inspection and copies, the Court can pass orders for the same. But the Court which has jurisdiction in these matters is not the criminal Court which has power to try offences under s. 622 *post*, but the Court which has under s. 10 jurisdiction under the Act, namely, the High Court or the District Court notified under that section within whose jurisdiction the registered office of the company is situate (26). Where the company alleges that the name of the applicant for copy is no longer on the register of members, the Court in making an order as to supply of copies (which a stranger is not entitled to get) will not go into the question whether his name has been rightly removed from the register especially where the question is already the

(17) *Bevan v. Webb* [1901] 2 Ch. 59.

(18) *Queen Empress v. Beer* [1898] 20 All. 126.

(19) *Boord v. African C. L. & Trading Co.* [1898] 1 Ch. 596; see also *Mutter v. Eastern Midland Ry. Co.* (*infra*) and *Nelson v. Anglo-American Land &c. Agency* [1897] 1 Ch. 130.

(20) *Boord v. African C. L. Trading Co.*, *supra*.

(21) *Davies v. Gas Light & Coke Co.* [1909] 1 Ch. 248, on appeal 708 (C.A.); *Mutter v. Eastern Midland Railway* [1888] 38 Ch. D. 92; *R. v. Wilts Navigation* [1873] 29 L.T. 922; *Holland v. Dickson* [1888] 37 Ch. D. 669.

(22) *Kent Coalfields Syndicates* [1898] 1 Q.B. 754.

(23) *Nelson v. Anglo-American Land &c. Co.* [1897] 1 Ch. 130.

(24) *Re Arauco Co.* [1899] W.N. 134.

(25) *Bank of Bombay v. Suleman Somji* [1908] 32 Bom. 466 (P.C.).



subject-matter of a suit (26). In the last cited case Mr. Justice Das made an order for giving inspection to the applicant not as a member but as a stranger.

See notes to s. 118 *ante*.

**757. Removal from registered office** :—It would be a breach of duty on the part of the directors to allow the register of members to be removed from the registered office of the company, and a solicitor cannot have a lien on it even if the company in general meeting pass such a resolution, because there are other persons, e.g., creditors who have a right to inspect it (27).

**758. Custody** :—The liquidator and not the receiver for debenture-holders should have the custody of the register upon a winding up (28).

**164. Registers etc., to be evidence.**—The register of members, the register of debenture holders, and the annual returns, certificates and statements referred to in sections 159, 160, and 161 shall be *prima facie* evidence of any matters directed or authorised to be inserted therein by this Act.

This section generalises the provision contained in s. 40 of the previous Act—*Notes on Clauses*.

It corresponds to s. 118 of the English Act of 1948.

**759. Register is prima facie evidence** :—The register of members is *prima facie* evidence of membership and the burden of proving want of notice of allotment is on the person who alleges it (29). It is not conclusive, especially where other papers filed by a plaintiff contradict the register, even though the defendant does not adduce any evidence (30). "If names are put upon the register without any authority, the owners of those names are in no way responsible" (31).

The register of members is not absolutely conclusive as to the number of shares held by a person, but it is necessary, not only from the point of view of law but as a matter of policy, to see that it is as conclusive as it can be made consistently with a proper interpretation of the Companies Act. When a person has been treated as a shareholder and acted as such, he cannot go back and deny his position to protect himself from liability, when he has full knowledge of his real position (32). Cases are not unknown however where promoters put names of persons of position on the register in the expectation that they would accept the shares, without any application on the part of the latter; and when the company goes into liquidation or its uncalled capital is sold to a third person, the persons whose names are thus put on the register find themselves in a rather difficult position on account of the presumption arising under this section. In such cases the promoter may be ready with the plea that those persons made oral applications for shares. The legislature, it is submitted, ought to have made written application for shares compulsory.

(26) *Murarka Paint & Varnish Works* [1948] 53 C.W.N. 590.

(27) *Capital Fire Insurance Association* [1883] 24 Ch. D. 408 at p. 414.

(28) *Engel v. South Metropolitan Brewery Co.* [1892] 1 Ch. 442.

(29) *Waryam Singh v. Eastern & Co.* [1926] 1. 414, 8 L.L.J. 240, 95 I.C. 252; *Sundar Singh v. Kehr Singh* [1933] L. 1016; *Marwari Stores v. Gouri Sankar* [1936] C. 327, 40 C.W.N. 661; *Punjab Industrial Bank v. Byramji* [1935] L. 157; *Bakhshis Singh v. Khalsa Bank* [1933] L. 1016, 147 I.C. 575.

(30) *Ramdas v. Cotton Ginning Co.* [1887] 9 All. 366.

(31) *Per Lord Cairns in Rees River Silver Mining Co.* [1869] 1 L.R. 4 H.L. 64 at p. 80.

(32) *Peninsular Life Assurance Co.* [1936] L. 226.

In *Portal v. Emmens* (33) Lindley, J. said: "The true view of the Act (34) we take to be as follows:—1. If a proper register is kept, that register is *prima facie* evidence that a person whose name is on it is a shareholder. 2. If in addition it be proved that such a person has become, by subscribing to the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive. 3. If there be no register, or if the register be so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder."

In proceedings before a Magistrate for penalties evidence may be given to prove entries in the register to be untrue (35).

### *Meetings and Proceedings*

**165. Statutory meeting and statutory report of company.**—(1) Every company limited by shares, and every company limited by guarantee and having a share capital, shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called "the statutory meeting".

(2) The Board of directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as "the statutory report") to every member of the company :

Provided that if the statutory report is forwarded later than is required above, it shall, notwithstanding that fact, be deemed to have been duly forwarded if it is so agreed to by all the members entitled to attend and vote at the meeting.

(3) The statutory report shall set out—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up, the extent to which they are so paid up, and in either case, the consideration for which they have been allotted ;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid ;

(c) an abstract of the receipts of the company and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and

(33) [1875] 1 C.P.D. 201 at pp. 212-13 ; affirmed *ibid* 664.

(34) Companies Clauses Act, 1845.

(35) Briton Medical Assn. [1888] 39 Ch. D. 61.

debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company, showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures ;

(d) the names, addresses and occupations of the directors of the company and of its auditors ; and also, if there be any, of its managing agent, secretaries and treasurers, manager, and secretary ; and the changes, if any, which have occurred in such names, addresses and occupations since the date of the incorporation of the company ;

(e) the particulars of any contract which, or the modification or the proposed modification of which, is to be submitted to the meeting for its approval, together in the latter case with the particulars of the modification or proposed modification ;

(f) the extent, if any, to which each under-writing contract, if any, has not been carried out, and the reasons therefor ;

(g) the arrears, if any, due on calls from every director ; from the managing agent, every partner of the managing agent, every firm in which the managing agent is a partner, and where the managing agent is a private company, every director thereof ; from the secretaries and treasurers ; where they are a firm, from every partner therein ; and where they are a private company, from every director thereof ; and from the manager, and

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director ; to the managing agent, any partner of the managing agent, any firm in which the managing agent is a partner ; and where the managing agent is a private company, to any director thereof ; to the secretaries and treasurers ; where they are a firm, to any partner therein ; and where they are a private company, to any director thereof ; or to the manager.

(4) The statutory report shall be certified as correct by not less than two directors of the company one of whom shall be a managing director, where there is one.

After the statutory report has been certified as aforesaid, the auditors of the company shall, in so far as the report relates to the shares allotted by the company, the cash received

in respect of such shares and the receipts and payments of the company on capital account, certify it as correct.

(5) The Board shall cause a copy of the statutory report certified as is required by this section to be delivered to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company.

(6) The Board shall cause a list showing the names, addresses and occupations of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the statutory meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not; but no resolution may be passed of which notice has not been given in accordance with the provisions of this Act.

(8) The meeting may adjourn from time to time, and at any adjourned meeting, any resolution of which notice has been given in accordance with the provisions of this Act, whether before or after the former meeting, may be passed; and the adjourned meeting shall have the same powers as an original meeting.

(9) If default is made in complying with the provisions of this section, every director or other officer of the company who is in default shall be punishable with fine which may extend to five hundred rupees.

(10) This section shall not apply to a private company.

This section corresponds to s. 77 of the previous Act and s. 130 of the English Act of 1948. It is considered desirable to place the provision about the statutory meeting which will precede the first annual general meeting, before the provision relating to the latter. Clause (f) of sub-s. (3) is new and has been inserted in accordance with the recommendation of the C. I. C. at page 247 of their Report—*Notes on Clauses*.

Some minor or drafting changes in this section have been made by the Joint Committee (*vide* J.C.R., para 67).

760. The notice convening the meeting should state that it is to be the "statutory meeting" (36).

761. For the circumstances under which a compulsory winding up order may be passed for failing to file the statutory report with the Registrar, see the case noted below (37) and s. 433, cl. (b).

(36) *Gardner v. Iredale* [1912] 1 Ch. 700.

(37) *Kent Outcrop Coal Co.* [1912] W.N. 26.

**SUB-S. (9)** :—See notes to s. 162.

**Form** :—For the form of Statutory Report, see Form No. 22 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956 printed as Appendix B.

**166. Annual general meeting.**—(1) (a) Every company shall, in addition to any other meetings, hold a general meeting which shall be styled its annual general meeting at the intervals, and in accordance with the provisions, specified below.

(b) The first annual general meeting shall be held by a company within eighteen months of its incorporation.

(c) The next annual general meeting of the company shall be held by it within nine months after the expiry of the financial year in which the first annual general meeting was held ; and thereafter an annual general meeting shall be held by the company within nine months after the expiry of each financial year :

Provided that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a further period not exceeding six months.

(d) Except in the case referred to in the foregoing proviso not more than fifteen months shall elapse between the date of one annual general meeting and that of the next.

(2) Every annual general meeting shall be called for a time during business hours, on a day that is not a public holiday, and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate ; and the notices calling the meeting shall specify it as the annual general meeting.

This section corresponds to s. 76 of the previous Act and s. 131 of the English Act of 1948. The C. L. C. has revised the whole section so as to give effect to the suggestions contained in para 73 of their Report (see p. 347 of the Report). An attempt has been made to draft the clause in as clear and simple terms as possible. The expression "financial year" which occurs in this section will have the meaning assigned to it by cl. 195 (now s. 210)—*Notes on Clauses*.

In para 73 of their Report the C. L. C. observe: "The more important meeting is, however the annual general meeting provided for under s. 76 of the Act. In modification of the existing provision, we recommend that the first annual general meeting must be held within eighteen months of the incorporation of a company and thereafter within nine months from the end of each financial year, provided that in no case more than fifteen months should elapse between the date of one general meeting and that of another.

"We further recommend that the Registrar should have the power in special circumstances, to extend the time during which a general meeting should be ordinarily held. . . The grant of this discretionary power to the Registrar to be exercised only in cases of proved hardship. In default of the holding of an annual general meeting by the company . . . the Central Government should have the power to call such a meeting on the application of a shareholder, and to give such directions for this purpose as it may think fit. This is in consonance with the provisions of s. 131 of the English Companies Act, 1948 which confers this power not on the Court but on the Board of Trade."

This was originally cl. 159 of the Bill. This clause has been amended by the Joint Committee "so as to provide that the *first* annual general meeting of the company must be convened within the period specified in this clause and that no extension of time should be granted for holding that meeting.

"The insertion of the definition of 'public holiday' in clause 2 has rendered it unnecessary to keep the Explanation to sub-clause (2).

"Sub-clauses (3) and (4) of the original clause 159 have been put as separate clauses, 166 and 167 (now ss. 167 and 168), as they deal with distinct matters" (*vide* J. C. R., para 68).

**762. Scope :—**The terms of the section are mandatory. They make no reference to the balance-sheet. The section has nothing to do with the preparation of a balance-sheet (38).

**763.** Notwithstanding regulations made by the State Government under s. 248 of the previous Act with respect to the duties of the Registrar, a shareholder is entitled to file a complaint against directors for failure to comply with the provisions of the old section 76. (39).

**764. Meaning of "Year" :—**"Year" in s. 76 of the old Act meant the calendar year (40) which commences on the 1st day of January (41); so it would be sufficient if the meeting was held before 31st December in any year, provided that it was within 15 months from the time when the last meeting was held (42).

**765.** Sub-s. (1) of 76 of the old Act demanded that there should be a general meeting held once at least in every year, *i.e.*, one separate and distinct meeting every year. Where a meeting called and held on a day in one year is adjourned to a date in the next year, and held on that date, the meeting held on the latter date is not a different meeting and does not satisfy the requirements of this section (43).

**766. What is general meeting :—**The old section did not make a difference between a general meeting and an extraordinary general meeting; so where such a meeting was held within the 15 or 18 months, as the case might be, no offence was committed if the general meeting had not been held within that period (44). But the Bombay Court held that an extraordinary general meeting held on the requisition of certain shareholders was not a general meeting within this section (45).

(38) *Brahmanberia Loan Co.* [1934] C. 624, 61 Cal. 408, 151 I.C. 693.

(39) *Laxmi Narain v. Mahajan* [1928] N. 186, 29 Cr. L.J. 581, 109 I.C. 597.

(40) *Park v. Lawton* [1911] 1 K.B. 588; *Gibson v. Barton* [1875] L.R. 10 Q.B. 329, 32 L.T. 396; *Edmunds v. Foster* [1875] 33 L.T. 690. See also General Clauses Act, s. 3, cl. (66).

(41) *Gibson v. Barton* [1875] L.R. 10 Q.B. 329.

(42) *Smedly v. Registrar of Companies* [1919] 1 K.B. 97.

(43) *Sree Minakshi Mills Co. v. Asst. Registrar* [1938] M. 640, [1938] M.L.J. 856.

(44) *Lachmi Narain v. Emp.* [1919] 21 Cr. L.J. 94, 54 I.C. 494; see also *Loid Claude Hamilton's case* [1873] 8 Ch. App. 548.

(45) *Emp. v. Nasurbhai A. Lalji* [1923] B. 194, 26 Bom. L.R. 224, 24 Cr. L.J. 349, 72 I.C. 349.

**767. Power of general meeting** :—A company in general meeting can do all acts save those delegated to the directors and other persons by the articles of association. Such acts are done by votes of the majority, as observed by Lord Hardwick : "Whenever a certain number are incorporated, a major part may do any corporate act ; so if all are summoned and part appear, a major part of those that appear may do a corporate act though nothing be mentioned in the charter of the major part" (46). The assent of every member of the company will not be effective (47), unless the company is not one inviting or proposing to invite subscription from the public (48). But knowledge and acquiescence of all the members may condone a breach of trust committed by the directors (49). The presence of all the members at a meeting is sufficient to regularize any resolution passed whether there has or has not been due notice (50) where the act is not *ultra vires* of the company (51).

It has been held by the Madras High Court that where there is nothing in the articles of association to show that the general power of the shareholders at a meeting to cancel a decision of the directors is not possessed by the company, the failure to note forfeiture of shares as per resolution of the directors which was cancelled at a general meeting of the company cannot be treated as default (52). This raises the question, where the general or particular powers of the company are vested in the directors by the articles, can the company in general meeting override such powers of the directors ? With all respect to the learned Judge it is submitted that the company cannot do it (53).

Where there were no validly appointed directors at the time of the general meeting, members could elect directors at such meeting (54).

For the powers or acts directed or required by the present Act to be exercised or done by a company in general meeting see Note 1048 *post*.

**768. Resolution** : Where a general meeting is convened with notice to all the shareholders but some of them do not choose to appear, they must be held to be bound by the resolutions passed by the majority (55). Absent members are affected by the information furnished by the directors at a general meeting and bound by the proceedings as to matters within its competence (56). Where a meeting is called as a meeting of directors, all the directors are present and they are the only shareholders in the company, the meeting is practically a meeting of shareholders at which resolution may be passed which would otherwise be invalid under the articles of association (57).

**769. Rights of the minority** :—A meeting of shareholders cannot by a majority refuse to hear the arguments of the minority ; but when such arguments have been heard, it is competent for the meeting to apply the closure, *i.e.*, to declare the discussion closed and put the motion to the vote (58).

(46) *Attorney-General v. Davy* [1744] 2 Atk. 212 ; see also *Merchants of the Staple v. Bank of England* [1888] 21 Q.B.D. 160.

(47) *George Newman & Co.* [1895] 1 Ch. 674.

(48) *A. C. for Canada v. Standard Trust Co.* [1911] A.C. 498.

(49) *Per Romer L. J.* in *Innes & Co.* [1903] 2 Ch. 254, at pp. 265-66.

(50) *Express Engineering Works* [1920] 1 Ch. 466.

(51) *Baroness Wenlock v. River Dee Co.* [1883] 36 Ch. D. 675n. at p. 681n.

(52) *Lakshmana. v. Emp.* [1932] M. 497, 35 M.W.N. 661.

(53) See *Automatic S. C. F. Syndicate v. Cunninghame* [1906] 2 Ch. 34 ; *Quin & Axtens v. Salmon* [1909] A.C. 442 ; *Gramophone & C. Ltd. v. Stanley* [1908] 2 K.B. 89.

(54) *Viswanathan v. Tiffin's Barytes & Paints Ltd.* [1953] M. 520, [1953] 1 M.L.J. 364.

(55) *Pabna Dhana Bhandar Co. v. Jagneswar* [1933] 37 C.W.N. 909.

(56) *Norwich Yarn Co.* [1856] 22 Beav. 143.

(57) *Express Engineering Works* (*supra*).

(58) *Wall v. London & N. A. Corporation* [1898] 2 Ch. 469 (C.A.).

**770. Interference by Court** :—On the well-known principle that the Court will not interfere with the internal management of companies, a very strong case must be made out to induce the Court to stop a general meeting of shareholders, especially on an interlocutory motion (59).

**771. Proceedings of a general meeting** :—The proceedings of a general meeting may be declared invalid unless such meeting has been properly convened, properly constituted and properly conducted (60).

**772. Adjournment** :—In the absence of express authority in the articles, the directors have no power to postpone a general meeting properly convened (61); but the chairman can on proper grounds adjourn the meeting (62). An adjourned meeting is merely a continuation of the original meeting (63).

Where the articles provide that "the chairman with the consent of the meeting may adjourn it," he is not bound to adjourn, even though the majority desire the adjournment (64). But he cannot, by leaving the chair before the business is completed, bring the meeting to a close; and if he purports to do so, the meeting may elect another chairman and proceed with the business (65).

**773. Duties of the chairman** :—It is the duty of the chairman to preserve order, to conduct proceedings of the meeting regularly and to take care that the sense of the meeting is ascertained with regard to any question before it.

**774. Notice of general meeting** :—Every member is entitled to notice of a general meeting (66). If special business is to be transacted, the notice must specify its nature (67). A notice which stated that the object was to adopt new regulations, instead of Table A, but did not set out the contents of the new regulations, was held to be good (68). A notice which states that a certain resolution will be passed "with such amendments as shall be determined at the meeting" is a good notice (69). A notice however should show substantially what is proposed to be done, e.g., a notice of a resolution to increase the capital should specify the amount of the proposed increase (70). What is sufficient notice of the general nature of the business proposed to be transacted must be determined from the particular circumstances of each case (67).

As a general rule, the notice of a general meeting should contain clear information as to what is proposed to be done; for an insufficient notice may invalidate the whole proceeding (71). The terms of any specific resolution to be proposed need not be set out in the notice, unless a special resolution is intended to be passed (72). But if something is kept back concealed, it will invalidate the proceedings (73). Thus a notice to adopt new articles of association which might

(59) *Amai Fakirji v. Pearson* [1926] S. 295, 97 L.C. 84 following *Last v. Bullett & Co.* [1919] 36 T.L.R. 35.

(60) *Henderson v. Bank of Australasia* [1890] 45 Ch. D. 330 at p. 346.

(61) *Smith v. Paranga Mines Ltd.* [1906] 2 Ch. 193.

(62) *Queen v. Wimbledon Local Board* [1882] 8 Q.B.D. 159.

(63) *Mc Laren v. Thompson* [1917] 2 Ch. 261; *Spencer v. Kennedy* [1926] Ch. 125.

(64) *Salisbury Gold Mining Co. v. Hathorn* [1897] A.C. 268; *Parshuram v. Tata Industrial Bank* [1923] 47 Bom. 915.

(65) *National Dwellings Society v. Sykes* [1894] 3 Ch. 159.

(66) *Smyth v. Darley* [1849] 2 H.L.C. 789; *Tissen v. Henderson* [1899] 1 Ch. 861.

(67) *Tiessen v. Henderson* (supra).

(68) *Young v. South African Syndicate* [1896] 2 Ch. 268.

(69) *Betts & Co. v. Macnaghten* [1910] 1 Ch. 430. In this case the Court looked at the notice as part of the *res gestæ* to see if the proceedings were regular.

(70) *Mac Connel v. E. Prill & Co.* [1916] 2 Ch. 57.

(71) *Tiessen v. Henderson* (supra); *Normandy v. Ind. Coöpe & Co.* [1908] 1 Ch. 84; *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 593.

(72) *Betts & Co. v. Macnaghten* (supra).



be seen at the company's office, is not sufficient where the new articles increase the directors' remuneration and borrowing power and make other important changes (74).

If notice to propose a director is required to be given so many days before the day of election, and the election takes place at an adjourned meeting, the notice is sufficient if given at the specified time before the date of the adjourned meeting (75.)

Where notice of a meeting has been duly given, it cannot be postponed by a subsequent notice (76). A notice to be good must be given by a person having authority to summon the meeting. A resolution passed at a meeting convened by the secretary without the authority of the board is invalid. In such a case the consent of the directors separately given will not cure the defect (77).

Notwithstanding a declaration by the chairman, the notice of the meeting may be looked at to see if the resolution is in order (78).

**775 Effect of acquiescence of a member :—**A company is not "corporate-ly assembled" unless all the members attend, or at any rate they have got notice of the meeting. But a member who is in fact present and has acquiesced in the resolution for a long time, cannot subsequently complain of any irregularity in summoning the meeting (79).

**776 Amendments :—**Where the notice is of a resolution to appoint as directors three persons named in the notice, three other names may be added by way of amendment (80). If the chairman improperly refuses to submit an amendment to the meeting, the resolution actually carried will be invalidated (81).

**777. Resolutions :—**Each resolution must, if any member so requires, be put separately to the meeting (82). The poll must also be taken separately (83).

**778. Right to vote :—**A right to vote is property, and the Court will interfere to protect a member from being deprived of this right (84). At a general meeting certain shareholders were, according to the decision of the majority of those present, not allowed to vote : *held* they were entitled to a declaration that they were entitled to vote at the meeting and that the ordinary Civil Court had jurisdiction to entertain the suit (85). Where an agreement for sale of shares has been made or shares are mortgaged, but the vendor's or mortgagor's name remains on the register of members, he alone can vote ; but he must do so in accordance with the directions of those entitled to the beneficial interest in the shares (86).

(73) *Kaye v. Croydon Tramways Co.* [1898] 1 Ch. 358 ; *Ladies' Imperial Club* [1920] 2 K.B. 523 ; in this case it was held that the omission to summon the absent member of a committee who had previously intimated her inability to attend, invalidated the proceedings of the committee.

(74) *Mc Laren v. Thompson* (supra) ; *Spencer v. Kennedy* (supra)

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(81) *Henderson v. Bank of Australasia* [1890] 45 Ch. D. 330.

(82) *Thompson v. Henderson's T. Estates* [1908] 1 Ch. 765 at p. 776.

(83) *Blair Open Hearth Furnace Co. v. Reigart* [1913] 108 L.T. 665, 29 T.L.R. 449 ; *Patent Wood Keg Syndicate v. Pearce* [1906] W.N. 164, 50 S.J. 650.

(84) *Pender v. Lushington* [1877] 6 Ch. D. 70 ; *Osborne v. Amalgamated Society of Ry. Servants* [1911] 1 Ch. 540.

(85) *Gobinda v. Akhoy* [1906] 10 C.W.N. 906.

(86) *Wise v. Lansdell* [1921] 1 Ch. 420 ; *Puddephatt v. Leith* [1916] 1 Ch. 200.

A provision in the articles that holders of any class of shares shall not have votes in respect of those shares is good, and resolutions passed by those having votes are binding even where they affect the interests of all classes (87). But one class of shareholders may not vote away the rights of another class (88).

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**780. Stamp on proxy paper :—**When properly stamped, a proxy to vote at any ordinary or extraordinary general meeting is valid (91). An adhesive stamp must be cancelled by having the signature of the shareholder written across it or by being otherwise obliterated (92). The Central Government has reduced to 2 as. the duty chargeable under the Stamp Act, 1899 on a proxy empowering policy-holders of an insurance company to vote at a meeting of the policy-holders to be held for the election of directors. *Vide* Gazette of India dated 13th September, 1941, Part I, p. 1298. For stamp on proxy paper generally see Appendix—"Stamp Duty".

**781. Speeches at the meeting :—**On the ground that members have a common interest in the affairs of the company, speeches at a meeting and circulars sent by directors or shareholders to the members are privileged, and in the absence of malice will not support an action for libel (93). But newspapers making a report of what passes at a meeting have not a similar privilege, nor may directors or shareholders publish to the world defamatory statements, even though contained in the report of a meeting (94).

**782. Penalty :—**In a case where there was no general meeting of the company during the year, before the managing director could be convicted under s. 32 of the old Act, it must be found that he was responsible for the default in respect of the holding of the general meeting, even assuming that he could not plead the impossibility of complying with s. 32 caused by the non-holding of the general meeting, if the impossibility was due to his default. Even if the accused had already been convicted under s. 76 of the old Act for default in connection with the holding of the general meeting, there must be an independent finding of the default in the prosecution under s. 32 of the old Act (95). Now see s. 162.

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(96) *Kasi Viswanadha v. Emp.* [1941] 1 M.L.J. 702, [1941] M.W.N. 381.

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(96) *Kasi Viswanadha v. Emp.* [1941] 1 M.L.J. 702, [1941] M.W.N. 381.

(97) *Periannan v. Emp.* [1941] M.W.N. 959, 197 I.C. 729.

Where almost all the shares were held by the accused and the only other shareholder was his brother, default of the accused in holding the general meeting due to a serious illness of his brother was not wilful (98).

When the Registrar condones the delay in holding a general meeting, the delay in filing a balance-sheet before the general body of this meeting must also be deemed to have been condoned (99). In such a case the directors cannot be convicted under this section and s. 220 whether the Registrar can condone the delay in holding a general meeting or not (99).

**784.** In dismissing an application for an order directing the calling of a general meeting, Buckland J. observed that the old section 76 was not intended to enable the Court to make an order which would excuse persons responsible for failure to call a general meeting from the consequences of their omission (1).

**785. One member is not meeting :—**One shareholder only present in person does not constitute a general meeting even if he holds a number of proxies (2). But a company present by a representative appointed under s. 187 will be treated as a member personally present (3). See in this connection s. 167 (1) Explanation.

**786. Exception :—**Where a company has shares of several classes and all the shares of one class are held by one person, a resolution signed by that person will be a resolution of a meeting of holders of shares of the class for the purpose of an article requiring the sanction of such a resolution to the issue of further shares of the class (4).

**787. Waiver :—**As to the waiver, see the undernoted case (5).

**788. General meeting :—**Where the articles of an insurance company provided that the meeting of the policy-holders was to be held at the registered office of the company, and the directors refused permission to hold the meeting there, a meeting held at another place was held to be perfectly regular as the change of venue was caused by the company itself; for a party cannot take advantage of its own wrong (6). Where the articles of a company provided: "At every ordinary general meeting the directors shall lay before the company a profit and loss account and a balance-sheet containing a summary of the property and assets and liability of the company made up to a date not more than four months before the meeting from the time when the last preceding account and balance-sheet were made up," it was held that there was nothing to indicate that a meeting must be called for within four months from the date when balance-sheets under the rules were made up (7).

**167. Power of Central Government to call annual general meeting.—**(1) If default is made in holding an annual general meeting in accordance with section 166, the Central Government may, notwithstanding anything in this Act or in the articles of the company, on the application of

(98) *Kestoor Mal. v. State* [1951] A.J. 39, 52 Cr. L.J. 237.

(99) *In re Ramanujam* [1911] M. 504, [1941] 1 M.L.J. 419, [1941] M.W.N. 225.

(1) *Brahmanberia Loan Co.* [1934] C. 624, 61 Cal. 408, 151 I.C. 693.

(2) *Sharp v. Dawes* [1876] 2 Q.B.D. 26; *Sanitary Carbon Co.* [1877] W.N. 233.

(3) *Kelantan Estates* [1920] W.N. 274, 64 S.J. 700.

(4) *East v. Bennett Bros.* [1911] 1 Ch. 163.

(5) *Borland's Trustee v. Steel Bros.* [1902] 1 Ch. 293.

(6) *Subramania v. United India Life Insurance Co.* [1928] M. 1215, 55 M.L.J. 385 [New Zealand Shipping Co. v. Societe des Ateliers (1919) A.C. 1 & Quensel Forks Gold Mining Co. v. Ward (1920) A.C. 222 followed.]

(7) *Lakshmana v. Emp.* [1932] M.W.N. 1157, 138 I.C. 317, [1932] M 497.

any member of the company, call, or direct the calling of, a general meeting of the company and give such ancillary or consequential directions as the Central Government thinks expedient in relation to the calling, holding and conducting of the meeting.

*Explanation.*—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Central Government, be deemed to be an annual general meeting of the company.

This section has been inserted by the Joint Committee. It corresponds to sub-s. (2) and (3) of the English Act of 1948.

See notes to s. 166.

**168. Penalty for default in complying with section 166 or 167.**—If default is made in holding a meeting of the company in accordance with section 166, or in complying with any directions of the Central Government under sub-section (1) of section 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

**788A.** This section also has been inserted by the Joint Committee. See notes to s. 166. It corresponds to s. 76 (2) of the previous Act, convictions under which was not sustainable if the default in holding the annual general meeting was not wilful and was due to unavoidable reasons (8). See Notes 782 and 783.

This section corresponds to sub-s. (5) of s. 131 of the English Act of 1948.

**169. Calling of extraordinary general meeting on requisition.**—(1) The Board of directors of a company shall, on the requisition of such number of members of the company as is specified in sub-section (4), forthwith proceed duly to call an extraordinary general meeting of the company.

(2) The requisition shall set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists, and shall be deposited at the registered office of the company.

(3) The requisition may consist of several documents in like form, each signed by one or more requisitionists.

(4) The number of members entitled to requisition a meeting in regard to any matter shall be—

(a) in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition, not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting in regard to that matter ;

(b) in the case of a company not having a share capital, such number of them as have at the date of deposit of the requisition not less than one-tenth of the total voting power of all the members having at the said date a right to vote in regard to that matter.

(5) Where two or more distinct matters are specified in the requisition, the provisions of sub-section (4) shall apply separately in regard to each such matter ; and the requisition shall accordingly be valid only in respect of those matters in regard to which the condition specified in that sub-section is fulfilled.

(6) If the Board does not, within twenty-one days from the date of the deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matters on a day not later than forty-five days from the date of the deposit of the requisition, the meeting may be called—

(a) by the requisitionists themselves,

(b) in the case of a company having a share capital, by such of the requisitionists as represent either a majority in value of the paid-up share capital held by all of them or not less than one-tenth of such of the paid-up share capital of the company as is referred to in clause (a) of sub-section (4), whichever is less ; or

(c) in the case of a company not having a share capital, by such of the requisitionists as represent not less than one-tenth of the total voting power of all the members of the company referred to in clause (b) of sub-section (4).

*Explanation.*—For the purposes of this sub-section, the Board shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by sub-section (2) of section 189.

(7) A meeting called under sub-section (6) by the requisitionists or any of them—

(a) shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by the Board ; but

(b) shall not be held after the expiration of three months from the date of the deposit of the requisition.

*Explanation.*—Nothing in clause (b) shall be deemed to prevent a meeting duly commenced before the expiry of the period of three months aforesaid, from adjourning to some day after the expiry of that period.

(8) Where two or more persons hold any shares or interest in a company jointly, a requisition, or a notice calling a meeting, signed by one or some only of them shall, for the purposes of this section, have the same force and effect as if it had been signed by all of them.

(9) Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board duly to call a meeting shall be repaid to the requisitionists by the company ; and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

This section corresponds to s. 78 of the previous Act and s. 132 of the English Act of 1948. The recommendation contained in para 76 (see also p. 248) of the C. L. C. R. has been embodied in this section: *Notes on Clauses*.

The C. L. C. in para 76 of their Report observe : "We consider that this section should be supplemented by a suitable adaptation of the provisions of section 110 of the English Companies Act, 1948."

This was originally cl. 160 of the Bill, sub-clauses (1) to (4) of which have been redrafted by the Joint Committee as sub ss. (1) to (6), in order to bring out the intention more clearly (*vide* J.C.R., para 69).

**789. "Articles"** : It is very doubtful if a meeting which is valid under this section can be invalidated by an article. But there is nothing in the Act which requires that the articles must be rigid and may not provide for varying sets of circumstances (9).

**790. Meaning of "requisition", and signing it** :—The word "requisition" in sub-s. (2) means requisition signed by the holders of not less than one-tenth of the issued share capital for the time being. The one-tenth referred to is that part of the issued share capital upon which all calls &c. have been paid, and not one-tenth of the issued share capital the holders of which one-tenth have paid all calls &c. (10).

The requisition in the case of joint-holders of shares was to be signed by all the holders (11). But see now sub-s. (8).

**791. Date of requisition** :—In the case of calling a meeting on requisition, there is no presumption in law that the requisition is received on the date it bears (9).

(9) *Topandas v. Yeotmal Electric Supply Co.*, *infra*.

(10) *Fruit & V. G. Association v. Kekewich* [1912] 2 Ch. 52 at p. 58.

(11) *Patent Wood Keg Syndicate v. Pearse* [1906] W.N. 164, 50 S.J. 650.



**792. Object :—**Object of the meeting must be stated in the requisition. "It seems to me", said Warrington J. "that the words 'for the purpose of considering the constitution of the board and resolutions concerning the directorate and officers of the company' mean for the purpose of considering whether the shareholders of the company are satisfied with the personality and conduct of the board, and that for that purpose the requisition sufficiently states the objects for which the requisitionists desired to have the meeting called" (12).

**793. Injunction :—**With respect to the Court's power to restrain a meeting under this section the following observations of Lord Justice Lindley should be remembered : "We must bear in mind the decisions in *Foss v. Harbottle* (13) and the line of cases following it, in which this Court has constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the matters of which they complain by calling meeting. Bearing in mind that line of decisions what would be the position of shareholders if there were to be another line of decisions prohibiting meeting of the shareholders to consider their own affairs? It appears to me that it must be a very strong case indeed which would justify this Court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power. I can conceive of a case in which a meeting might be called under such a notice that nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted" (14).

**794. What is "like form" :—**A number of requisitions in the following form were deposited at the registered office of a company : "We the undersigned hereby request you to call an extraordinary general meeting of the shareholders for the purpose of considering the reconstruction of the board and resolutions concerning the directorate and officers of the company." Other requisitions were deposited in the same form except that at the end there were added the words "in addition to the affairs of the company in general." It was held that these requisitions were in "like form" and that they sufficiently stated the objects for which the requisitionists desired to have the meeting called (15).

The secretary however cannot, on receipt of the requisition, summon a meeting without the sanction of the board (16).

If the directors convene a meeting to consider part only of the specified matters, the requisitionists may ignore it and call their own meeting (17).

**795. Directors' duties and rights :—**The directors had a duty as well as a right to circularize the members for the purpose of advertising them as to the wisdom of any proposed resolution and might use the company's money for this purpose or for procuring proxies in their own favour (18).

**796. Notice :—**The notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder to determine whether he should attend the meeting, and the pecuniary interest of a director in a special resolution to be proposed at the meeting is a material fact for this purpose (19). It cannot however

(12) *Fruit & Vegetable Growers' Assn. v. Kekewich* [1912] 2 Ch. 52 (59).

(13) [1843] 2 Hare 461.

(14) *Isle of Wight Ry. Co. v. Tahourdin* [1883] 25 Ch. D. 320 (333-34).

(15) *Fruit & V. G. Association v. Kekewich* [1912] 2 Ch. 52 at p. 58.

(16) *State of Wyoming Syndicate* [1901] 2 Ch. 431.

(17) *Isle of Wight Ry. Co. v. Tahourdin* [1883] 25 Ch. D. 320.

(18) *Peel v. London & N. W. Railway* [1907] 1 Ch. 5; *Campbell v. Australian Mutual Provident Society* [1908] 77 L.J. (P.C.) 117, 24 T.L.R. 623.

(19) *Tiessen v. Henderson* [1899] 1 Ch. 861.

be held that unless the notice of the meeting recites all the facts necessary to meet every technical objection which may be raised to its validity the meeting held in pursuance of such notice must be invalid (20).

**796A. Irregularity in holding meeting :—**The managing director of a company having failed to convene a meeting for the election of a new managing director, the shareholders themselves convened a meeting at the registered office of the company. At the date of the meeting the assembled shareholders finding the registered office locked up held the meeting at a nearby place and passed a resolution removing the managing director from his office : *held*, even if the holding of the meeting outside the registered office was an irregularity, it was not an illegality which would vitiate the meeting (21). Moreover the managing director is precluded from challenging the validity of the meeting by his conduct in locking up the registered office (21).

**797. Court's jurisdiction in enforcing resolution :—**It appears that the company Judge has no jurisdiction to give effect to any resolution passed at a requisitionists' meeting or to grant any consequential relief. Thus where the directors disregarded a requisition deposited under this section and the requisitionists thereupon held their own meeting in which resolutions were passed removing the board of directors, appointing a fresh board and replacing one K as secretary and treasurer by one R who then filed an application in the High Court praying for a direction to K to hand over to him the records, account books, pass books, keys &c. it was *held*, that (1) there was no specific provision in the Act which enabled such a petition to be filed ; (2) the application could not be entertained under the inherent jurisdiction of the Court, as there was no right given to R under the Act, the protection of which was not expressly provided for therein : (3) R had a remedy by suit in the ordinary Court (22).

See notes to s. 166.

**798. Postponement :—**When a general meeting has been convened, the directors cannot postpone it in the absence of express provision in the articles to that effect (23).

**799. Effect of irregularity :—**A meeting convened by a Board not properly constituted may be irregular and the resolutions invalid (24). A meeting summoned by the secretary without authority of the directors, duly assembled at a board (25), or without any authority from any director is also invalid (26).

**800. Extraordinary general meeting on requisition :—**The shareholders of a company called upon the managing director (plaintiff) to convene a meeting for the election of a new managing director. He having failed to do so within 21 days, they issued notices of meeting on a particular date to be held at the registered office of the company. The premises of the company having been found locked up on that date, the assembled members adjourned to a nearby premises, held the meeting and passed a resolution removing the plaintiff from the managing directorship. A suit was filed by him questioning the validity of the meeting : *Held* that (i) as the plaintiff was suing in respect of an individual wrong in which all the shareholders

(20) *Topandas v. Yeotmal Electric Supply Co.* [1940] S. 87, 190 I.C. 551.

(21) *Rathnavelusami v. Manickavelu* [1951] M. 542.

(22) *Srikrishna Jute Mills v. Mothev Krishna* [1947] M. 322, [1947] M.L.J. 75, 60 M.L.W. 90.

(23) *Smith v. Paringa Mines* [1906] 2 Ch. 193.

(24) *Harben v. Phillips* [1883] 23 Ch. D. 14, 34.

(25) *Haycraft Gold Co.* [1900] 2 Ch. 230.

(26) *State of Wyoming Syndicate* [1901] 2 Ch. 431. As to subsequent ratification by the directors see *ibid* at p. 147 and *Hopper v. Kerr, Stuart & Co.* [1900] 83 L.T. 729.

were interested the suit was maintainable, (ii) assuming there was a violation of law by reason of the members assembled at the registered office holding the meeting at a nearby place, in view of the difficulty created by the locking up of the registered office, the violation was only an irregularity and not an illegality vitiating the meeting and (iii) the plaintiff was precluded from complaining of any invalidity by reason of his own conduct in making the registered office unavailable for the meeting (27).

**801. Principle of "Internal management":**—Upon the principle that the Court will not interfere with the internal management of a company, the Court will not direct a meeting for general purposes when the directors or the requisite number of shareholders do not think it advisable to summon a general meeting (28).

**802. Injunction :**—As regards restraining a general meeting, it must be a very strong case indeed which will justify the Court to do so (29).

## 170. Sections 171 to 186 to apply to meetings.—(1) The provisions of sections 171 to 186—

(i) shall, notwithstanding anything to the contrary in the articles of the company, apply with respect to general meetings of a public company, and of a private company which is a subsidiary of a public company ; and

(ii) shall, unless otherwise specified therein or unless the articles of the company otherwise provide, apply with respect to general meetings of a private company which is not a subsidiary of a public company.

(2) (a) Section 176, with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members, or of debenture holders or any class of debenture holders, of a company, in like manner as it applies with respect to general meetings of the company.

(b) Unless the articles of the company or a contract binding on the persons concerned otherwise provide, sections 171 to 175 and sections 177 to 186 with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members, or of debenture holders or any class of debenture holders, of a company, in like manner as they apply with respect to general meetings of the company.

SS. 171 to 186 embody the provisions contained in the new ss. 79 and 79A suggested by the C. L. C. in para 75 and at pages 348 to 352 of their Report, as well as the important provisions contained in Table A of the previous Act, in so

(27) *Rathnavelusami v. Manickavalu* [1951] 1 M.L.J. 5.

(28) *Macdougall v. Gardiner* [1875] 10 Ch. App. 606.

(29) *Isle of Wight Ry. Co. v. Tahourdim* [1883] 25 Ch. D. 320 ; *Harben v. Phillips*, supra.

far as they are applicable to meetings—*Notes on Clauses*. Compare sub-s. (1) of s. 79 of the old Act.

S. 170 is new. It indicates the extent of the applicability of the subsequent sections. They will apply in their entirety and notwithstanding anything to the contrary contained in the articles, to public companies and private companies which are subsidiaries of public companies. So far as private companies which are not subsidiaries of public companies are concerned they will apply only to the extent to which the articles of the company do not contain provisions to the contrary. In regard to meetings of any class of members of the company or debenture-holders or any class of debenture-holders, the provision relating to proxies (s. 176) will apply with such adaptations and modifications as may be found necessary. The other sections with necessary adaptations and modifications will apply unless the articles of the company or a contract binding on the persons concerned otherwise provide—*Notes on Clauses*. Some verbal changes have been made by the Joint Committee.

See s. 79 (1) of the old Act.

**Rule** :—Rule made by the Central Government under this section provides: "Sections 171 to 186 shall apply—

- (a) with respect to meetings of any class of members of a company, as adapted and modified in the Form set out in Annexure B ;
- (b) with respect to meetings of debenture-holders of a company, as adapted and modified in the form set out in Annexure C ; and
- (c) with respect to meetings of any class of debenture-holders of a company, as adapted and modified in the form set out in Annexure D :

Provided that the applications of sections 171 to 175 and sections 177 to 186 as in Annexure B, C or D, as the case may require, shall be subject to such other provision as may be made either in the Articles of the company or in a contract binding on the persons concerned"—*See Rule 7 of the Companies (Central Government's) General Rules and Forms, 1956, printed as Appendix B.*

**171. Length of notice for calling meeting.**—(1) A general meeting of a company may be called by giving not less than twenty-one days' notice in writing.

(2) A general meeting may be called after giving shorter notice than that specified in sub-section (1), if consent is accorded thereto—

(i) in the case of an annual general meeting, by all the members entitled to vote thereat ; and

(ii) in the case of any other meeting, by members of the company (a) holding, if the company has a share capital, not less than 95 per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting, or (b) having, if the company has no share capital, not less than 95 per cent. of the total voting power exercisable at that meeting :

Provided that where any members of a company are entitled to vote only on some resolution or resolutions to be moved at

a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter.

This section is new and is based on sub-clause (1) (a) of the redraft of s. 79 at p. 348 of the C. L. C. R.—*Notes on Clauses*. Compare s. 79 (1) (a) and Reg. 49 of Table A of the previous Act. The section corresponds to s. 133 of the English Act of 1948.

"We further recommend that twenty-one days' notice should be given of all resolutions to be passed at a general meeting—ordinary or special. The extension of the period of notice from fourteen to twenty-one days is necessary to enable shareholders to combine and canvass for proxies if they so desire. The present period of fourteen days is too short for all the processes that are involved before the shareholders canvass opinion in favour of or against a particular resolution proposed to be considered at any meeting of the company" (C. L. C. R., para 78).

Some verbal changes have been made in this section by the Joint Committee.

**803. Sufficiency of notice :—**The notice must give substantial information as to what is proposed to be done at the meeting. Resolutions passed upon insufficient notice may be invalid (30). As to what is sufficient notice see the cases noted below (31). If proper and sufficient notice of the intention to propose a resolution is given, nothing more is required and the resolution is not invalidated if owing to an amendment at the first meeting, the resolution passed is not identical with that of the notice (32).

Although the section is sufficiently complied with if the notice states the general nature of the business it is nevertheless desirable, where the business is of great importance, such as a proposed substitution of new articles for Table A, to supplement the notice with an explanatory circular (33).

"It is settled that the notice, which specifies the business to be done or the objects of the meeting, is to be a fair notice intelligible to the minds of ordinary men—the class of men who are shareholders in the company and to whom it is addressed. The Court does not scrutinize these notices with a view to exercise criticism or to find out defects, but it looks at them fairly" (34). The Court is however entitled to look at the notice as part of the *res gesta* to see if the proceedings are irregular (35).

Shareholders are presumed to know the Act of the legislature and also the terms of the memorandum and articles of association. Notice must be read in reference to these (36).

When the notice did not describe the contents of the agreement which formed the subject of the resolution, it was held that such a resolution, although adopted by the requisite majority, was invalid and incapable of being made valid by acquiescence

(30) *Pacific Coast Coal Mines v. Artbuthnot* [1917] A.C. 607; *Normandy v. Ind, Coope & Co.* [1908] 1 Ch. 84; *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503.

(31) *Boschock Proprietary Co. v. Fuke* [1906] 1 Ch. 148; *Betts & Co. v. Macnaghten* [1910] 1 Ch. 430; *Wills v. Murray* [1869] 4 Ex. 893; *Young v. South African Syndicate* [1896] 2 Ch. 268.

(32) *Per Swinfen Eady J. in Torbock v. Westbury* [1902] 2 Ch. 871 at p. 874.

(33) *Young v. South African Syndicate* (supra).

(34) *Per Chitty J. in Henderson v. Bank of Australasia* [1890] 45 Ch. D. 330, 337.

(35) *Betts & Co. v. Macnaghten* (supra).

(36) *Campbell's case* [1873] 9 Ch. App. 1, 22.

on the part of the shareholders (37). But it is competent for the shareholders acting together to waive the formalities required by s. 189 to notice of intention to propose a resolution as a special resolution (38). If every member is present at the meeting, any resolution passed unanimously which is not *ultra vires* the company is valid and binding on the company, irrespective of what notice, if any, of the meeting was given (39).

Where notice was given of a resolution that three retiring directors should be re-elected with such amendments as should be determined at the meeting, and an amendment to the resolution was carried appointing two additional directors, it was held that the notice sufficiently indicated the business transacted (40).

**804. Notice issued without authority is invalid** :—The resolutions of a general meeting convened by *de facto* directors are not invalidated by any irregularity in the constitution of the Board (41). But notice issued by the secretary without the authority of a resolution of the Board is invalid (42). It may however become a good notice if adopted and ratified by a Board meeting held prior to the general meeting; for the ratification of an act purporting to be done by an agent on behalf of the principal dates back to the performance of the Act (43).

**805. Members entitled to receive notice** :—Subject to the limitation in the articles all shareholders on the register are entitled to receive notices and if any person entitled to attend is not regularly summoned, such meeting is irregular and its proceedings invalid (44). But a member who was present at a meeting cannot question its regularity (45).

No notice need be issued on members residing abroad (46). A notice must give a sufficiently full and frank disclosure of facts upon which the shareholders are asked to vote (47).

**806. Where not** :—In the absence of any provision in the articles the executors or administrators of a member, when not themselves registered as members, are not entitled to notice (48). It was not necessary to send a notice addressed to a deceased member or to his legal personal representative (48). But see now cl. (ii) of sub-s. (2) of s. 172. Members who have no registered address and in respect of whom there has not been furnished to the company any address in this country for the service of notice are not entitled to receive notices of general meetings, and the fact that a member has not been served with notice of a particular meeting does not invalidate a resolution passed at the meeting (49).

**807. General nature of business** :—A notice of the annual general meeting of the respondent company was sent to the shareholders containing a notification that the purpose of the meeting was, *inter alia*, "to elect directors," and on a fresh line were the words "In accordance with the articles of association Mr. C. W. Coan retires, and, being eligible offers himself for re-election." The articles incorporated

(37) *Pacific Coast Coal Mines v. Arbutnot* [1917] A.C. 607.

(38) See *Oxted Motor Co.* [1921] 3 K.B. 32.

(39) *Express Engineering Works* [1920] 1 Ch. 466.

(40) *Betts & Co. v. Macnaghten* (supra).

(41) *Boschoek Proprietary Co. v. Fuke* (supra).

(42) *Haycraft Gold Reduction Co.* [1900] 16 T.L.R. 350, [1900] 2 Ch. 230.

(43) *Per Cozens-Hardy L. J. in Hooper v. Kerr, Stuart & Co.* [1900] 83 L.T. 729 at p. 730.

(44) *Dobson v. Fussey* [1851] 7 Bing. 311.

(45) *British Sugar Refining Co.* [1875] 3 K. & J. 408.

(46) *Union Hill Silver Co.* [1870] 22 L.T. 403.

(47) *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503.

(48) *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656 (C.A.).

(49) *Dickson v. Halesowen Steel Co.* [1928] W.N. 33.

articles 49 and 50 (of Table A of the English Act of 1908) with regard to the question of notice. At the meeting in question Coan was proposed for election as a director, but an amendment was moved that three other persons be elected as directors. The amendment was ruled out of order by the chairman. He rejected on similar grounds a substantive motion that the three persons in question be directors. The appellants contended that the notice was such as to confine the business to the election of one director: *Held*, that the notice in question sufficiently specified, within the meaning of articles 49 and 50 of Table A, the general nature of the business to bring it within the competence of the meeting to elect directors up to the number permitted by the articles, that the chairman was wrong in refusing to allow the amendment to go to the meeting and that he was wrong in not putting the substantive motion to the meeting (50). As to the invalidity of subsequent proceedings where the chairman wrongly ruled out of order a proposed amendment, see notes to ss. 177 and 178.

Unless it is specifically provided in the articles that the day of service is to be excluded, in the number of days, such day is not to be excluded (51). The days will probably be calculated from midnight to midnight (52).

**808. Meaning of "fourteen days"** :—It was held under the old Act that "fourteen days" meant fourteen clear days between the day on which the members would receive the notice in ordinary course of post and the day of the meeting (53).

**809. Insufficiency of notice** :—When the notice convening a meeting is insufficient, the business, in the absence of a special provision in the articles, cannot be validly transacted, and the directors elected at the meeting are not directors (54). A shareholder who by his conduct shows that he knew the real effect of or work to be transacted at a meeting, cannot complain of the notice on the ground of insufficiency (55).

**810. What the notice should contain** : Special notice should be given of a resolution involving pecuniary advantage to a director (56). A notice omitting to state the particulars of the advantage is insufficient and the consequent resolutions are bad (57). But in the case noted below Cotton L. J. observed: "I do not think that the notice calling a meeting ought to be treated very critically in order to see whether we cannot pick out some defect in it." (58).

**811. Effect of irregularity in procedure** : Irregularity in the procedure at a meeting of shareholders is not a matter for interference by the Court, but for a majority of shareholders to deal with (59). A Court will interfere only if the rights of the shareholders are infringed or if a case of fraud or *ultra vires* action is made out (60).

For Rule made by the Central Government, see note under s. 170.

- (50) *Choppington Collieries, Ltd. v. Johnson* [1944] 1 All E. R. 762).
- (51) *Pavilion Newcastle-upon-Type* [1911] W.N. 235.
- (52) *Mercantile Investment Co. v. International Co.* [1893] 1 Ch. 484 n. at p. 489 n.
- (53) *Railway Sleepers Supply Co.* [1885] 29 Ch. D. 204.
- (54) *Garden gully &c. Mining Co. v. Mc Lister* [1875] 1 App. Cas. 39.
- (55) *Parashuram v. Tata Bank* [1928] B. 180 (P.C.), 55 I.A. 274, 52 Bom. 71.
- (56) *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D. 654 (C.A.).
- (57) *Normandy v. Ind. Coope & Co.* [1908] 1 Ch. 84.
- (58) *Henderson v. Bank of Australasia* [1891] 45 Ch. D. 330 at p. 343.
- (59) *Tanjore Permanent Fund Ltd. v. Sadasiva* [1926] M.W.N. 429, 50 M.L.J. 479, [1926] M. 705 following *Oxted Motor Co.* [1921] 3 K.B. 32; *Express Engineering Works* [1920] Ch. 466 and *Mac Dougal v. Gardinar* [1875] 1 Ch. D. 13.
- (60) *Parashuram v. Tata Industrial Bank* [1923] 47 Bom. 915, 25 Bom. L.R. 1083.

**172. Contents and manner of service of notice and persons on whom it is to be served.**—(1) Every notice of a meeting of a company shall specify the place and the day and hour of the meeting, and shall contain a statement of the business to be transacted thereat.

(2) Notice of every meeting of the company shall be given—

(i) to every member of the company, in any manner authorised by sub-sections (1) to (4) of section 53 ;

(ii) to the persons entitled to a share in consequence of the death or insolvency of a member, by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India supplied for the purpose by the persons claiming to be so entitled, or until such an address has been so supplied, by giving the notice in any manner in which it might have been given if the death or insolvency had not occurred ; and

(iii) to the auditor or auditors for the time being of the company, in any manner authorised by section 53 in the case of any member or members of the company.

(3) The accidental omission to give notice to, or the non-receipt of notice by, any member or other person to whom it should be given shall not invalidate the proceedings at the meeting.

This section also is new. It embodies the provision in s. 79 (1) (b) and reg. 116 of Table A of the previous Act. See also s. 134 (a) of the English Act of 1948. The provision that auditors should have notice of the general meeting sent to them is based on the C. L. C.'s recommendation. See redraft of s. 145B, sub-s. (4) at p. 425 of the C. L. C. R. Sub-s. (3) is based on the last portion of the redraft of s. 79 (1) (b) at page 348 of the C. L. C. R.—*Notes on Clauses*. This was originally cl. 163 of the Bill, sub-cl. (2) (ii) of which has been recast by the Joint Committee and the language of sub-s. (5) of s. 52 (now s. 53) having been adopted as far as possible (*vide* J.C.R., para 70).

For cases see notes to s. 171.

For Rule made by the Central Government, see note under s. 170.

**173. Explanatory statement to be annexed to notice.**—(1) For the purposes of this section—

(a) in the case of an annual general meeting, all business to be transacted at the meeting shall be deemed special, with the exception of business relating to (i) the consideration of the accounts, balance sheet and the reports



of the Board of directors and auditors, (ii) the declaration of a dividend, (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of, and the fixing of the remuneration of, the auditors ; and

(b) in the case of any other meeting, all business shall be deemed special.

(2) Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular the nature and extent of the interest, if any, therein, of every director, the managing agent, if any, the secretaries and treasurers, if any, and the manager, if any.

(3) Where any item of business consists of the according of approval to any document by the meeting, the time and place where the document can be inspected shall be specified in the statement aforesaid.

This section also is new. It is based on s. 79 (1) h) of the redraft suggested by the C. L. C. and reg. 50 of Table A of the previous Act—*Notes on Clauses*.

**§12. Special business—notice :—**An ordinary general meeting may transact special business if the notice provides for it (61) ; but unless the purport of the business to be transacted is stated in the notice convening the meeting, the meeting is invalid (62). It is not sufficient in a notice of an extraordinary general meeting to state merely that special business will be transacted (63). If special business is to be transacted the notice must specify its nature (64).

The business of the statutory meeting is special business (65).

Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice is given of the intention to propose such resolution (66).

For Rule made by the Central Government, see note under s. 170.

**174. Quorum for meeting.—**(1) Unless the articles of the company provide for a larger number, five members personally present in the case of public company, and two members personally present in the case of a private company, shall be the quorum for a meeting of the company.

(2) Unless the articles of the company otherwise provide, the provisions of sub-sections (3), (4) and (5) shall apply with respect to the meetings of a public or private company.

(61) *Graham v. Van Diemen's Land Co.* [1857] 26 L.J. Ex. 73.

(62) *Kaye v. Croydon Tramways Co.* [1898] 1 Ch. 358 (C.A.).

(63) *Wills v. Murray* [1869] 4 Ex. 869.

(64) *Tiessen v. Henderson* [1899] 1 Ch. 861.

(65) *Gardner v. Iredale* [1912] 1 Ch. 700.

(66) *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D. 654.

(3) If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present; the meeting, if called upon the requisition of members, shall stand dissolved.

(4) In any other case, the meeting shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place as the Board may determine.

(5) If at the adjourned meeting also, a quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall be a quorum.

This section is based on s. 79 (2) (b) and reg. 51 of Table A of the previous Act. The provision contained in this section may be overridden by the Articles—*Notes on Clauses*. Some verbal change has been made by the Joint Committee.

Sub-ss. (2) to (5) have been added by the Lok Sabha.

See s. 134 (c) of the English Act of 1948.

**813.** A person appointed under s. 187 to represent another company will be deemed to be a "member personally present" (67). Sometimes one member may form a quorum (68).

**814. Quorum** :—Resolutions for voluntary winding up of companies were invalid unless passed and confirmed at meetings at each of which there was present the necessary quorum (69). But two meetings are no longer necessary; see the new sub-s. (2) of s. 189.

Where an article provided that a member whose name had not been in the register for a continuous period of two months immediately preceding the date of the meeting would not be entitled to vote or to be reckoned in a quorum, it was held that the article was illegal being contrary to s. 79 (1) (c) of the old Act (70).

For further cases, see notes to reg. 49 of Table A.

**815. Non-members** :—The presence of non-members at a meeting without their taking any part in the proceedings does not invalidate the meeting (71). A resolution passed at a meeting at which there is no quorum (72), or at a meeting not properly convened is invalid (73). But the minutes will raise a presumption of its validity (74).

For Rule made by the Central Government, see note under s. 170.

**175. Chairman of meeting.**—(1) Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the chairman thereof on a show of hands.

(67) *Kelantan Coco-Nuts Estate* [1920] W.N. 274, 64 S.J. 700.

(68) *Fireproof Doors Ltd.* [1916] 2 Ch. 142.

(69) *Cambrian Peat Co.* [1875] 31 L.T. 773.

(70) *Viswanathan v. Tiffin's B. A. & Paints Ltd.* [1953] M. 520, [1953] 1 M.L.J. 346.

(71) *Quin v. National Society* [1921] 2 Ch. 318, 323.

(72) *Howbeach Coal Co. v. Teagne* [1860] 5 H. & N. 151.

(73) *Harben v. Phillips* [1883] 23 Ch. D. 14, 34

(74) S. 195.

(2) If a poll is demanded on the election of the chairman, it shall be taken forthwith in accordance with the provisions of this Act, the chairman elected on a show of hands exercising all the powers of the chairman under the said provisions.

(3) If some other person is elected chairman as a result of the poll, he shall be chairman for the rest of the meeting.

This section is new. It is in accord with the existing procedure observed by the companies and should be regarded as a provision prefatory to ss. 169 (now s. 178) *et seq.*—*Notes on Clauses.*

See Regs. 53 and 54 of Table A of the previous Act and s. 134 (d) of the English Act of 1948.

**816. General meeting** :—Where a general meeting is held in accordance with the Court's order, amendments may be rejected by the chairman, if they are contrary to the terms of the order (75).

**817. Chairman** :—Where the articles provide that the chairman of the Board of directors should preside at a general meeting if he is willing, he cannot be compelled to preside (76).

**818. Chairman's authority** :—The chairman at a general meeting has *prima facie* authority to decide all incidental questions which arise at such meeting and necessarily require decision at the time, and the entry by him in the minute books of the result of a poll or of his decision of all such questions, although not conclusive, is *prima facie* evidence of the result or of the correctness of that decision and the onus is thrown on those who impeach the entry (77).

• See notes to s. 166.

For Rule made by the Central Government, see note under s. 170.

**176. Proxies.**—(1) Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of himself; but a proxy so appointed shall not have any right to speak at the meeting :

Provided that, unless the articles otherwise provide—

(a) this sub-section shall not apply in the case of a company not having a share capital ;

(b) a member of a private company shall not be entitled to appoint more than one proxy to attend on the same occasion ; and

(c) a proxy shall not be entitled to vote except on a poll.

(2) In every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting

(75) *Rebello v. Co-operative Navigation & Trading Co.* [1924] 26 Bom. L.R. 907.

(76) *Narayana v. Kalceswarar Mills Ltd.* [1952] M. 515.

(77) *Indian Zoedone Co.* [1884] 26 Ch. D. 70.

by proxy at the meeting, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

If default is made in complying with this sub-section as respects any meeting, every officer of the company who is in default shall be punishable with fine which may extend to five hundred rupees.

(3) Any provision contained in the articles of a public company, or of a private company which is a subsidiary of a public company, shall be void, in so far as it would have the effect of requiring the instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company or any other person more than forty-eight hours before the meeting in order that the appointment may be effective thereat.

(4) If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to one thousand rupees :

Provided that an officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

(5) The instrument appointing a proxy shall—

(a) be in writing ; and

(b) be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

(6) An instrument appointing a proxy, if in any of the forms set out in Schedule IX, shall not be questioned on the

ground that it fails to comply with any special requirements specified for such instrument by the articles.

(7) Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

This section is based on s. 79A of the redraft suggested by the C. I. C. at pages 351-52 of the Report and s. 136 of the English Act of 1948. Sub-s. (5) is based on the first sentence of reg. 65 of Table A of the previous Act—*Notes on Clauses*.

The Lok Sabha has altered sub-s. (1) of this section making it clear that a proxy shall not have any right to speak at the meeting.

Compare s. 79 (1) (d) and regs. 64 to 67 of Table A of the previous Act.

In the present section elaborate provisions have been made regarding proxies.

**819. Inherent right** :—Formerly there was no inherent right of shareholders to vote by proxy, such right being by contract to be construed from the articles (78). In the last cited case at p. 263 Lord Justice Swinfen Eady observed: "At common law a proxy could not be used by a member of a corporation unless there was some specific provision which enabled him to do so. When you come to statutory corporations you must look at the statute itself and the rules which are created under it, to see whether it is the intention of the statute or the rules that a proxy should be used, and if so, in what form it should be used." Where proxies were allowed by the articles the chairman was to count the vote of a person holding proxy as a single vote (79).

A shareholder's right to vote by proxy was recognized by s. 79 of the old Act subject to conditions and limitations imposed by the articles (80). The present section recognizes this right subject to the conditions enumerated therein. A proxy as an agent of the shareholder is not entitled to act contrary to his instructions (80). If the proxy conformed to the articles in all respects, they could not be rejected by the chairman on the ground that they were powers of attorney and as such insufficiently stamped (80). Under the old Act it was held that proxy could be validly given only to a person who was a member of the company in the absence of a provision to the contrary in the articles (80). But under the present section it does not matter whether he is a member or not.

**820. Subsequent shareholder** :—Under articles which provided that "no person shall be appointed or have authority to act as a proxy who is not a shareholder", a proxy in favour of a person who was not a shareholder when it was signed, but was a shareholder at the date of the meeting, was valid (81). In the last cited case it was further held that as the articles did not require the shareholder using the proxy to be literally "named" therein, the proxy could not be objected to if he was sufficiently described for all business purposes, as for instance, a member for the time being of a specified firm.

(78) *Mc Laren v. Thomson* [1917] 2 Ch. 261.

(79) *Ernest v. Loma Gold Mines* [1897] 1 Ch. 1.

(80) *Narayana v. Kaleeswarar Mills Ltd.* [1952] M. 515.

(81) *Bombay Burmah Corpn. v. Dorabji* [1905] A.C. 213, 29 Bom. 126 (P.C.).

**821. Revocation of proxy :—**The principal cannot be denied his right to revoke a contract which brought about the relationship of principal and agent. This right of revocation is recognized in s. 203 of the Contract Act (82). Unless the right of revocation is expressly excluded by the articles, the right will be governed by the general law of contract of agency (82).

Where one of the articles expressly confers a specific power of revocation in respect of a permanent proxy, it cannot be deemed, in the absence of any such provision in respect of a specific proxy, that the power of revocation is excluded on the maxim *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another) (82).

The power to revoke an authority given to an agent, after the authority has been partially exercised, has been recognised by s. 204, Contract Act. The revocation, however, cannot invalidate acts and obligations already done and incurred by the agent. Where the first poll of the meeting at which the proxies were exercised became final, the effect of revocation of the proxies subsequently, but before the second poll, cannot affect the declaration of the result of that poll (82).

The effect of the want of notice of revocation of proxies to the agent (proxy) does not invalidate the revocation or termination of the authority of the proxy, but makes the principal liable for any damage that results to the agent by reason of such want of notice (82).

**822. Revoked proxy :—**The articles of a company said: "A vote given in accordance with the terms of an instrument of proxy or power of attorney shall be valid notwithstanding the previous death of the principal or revocation of the proxy or power of attorney . . . provided no intimation in writing of the death or revocation shall have been received at the office before the meeting." A letter revoking the proxy was written by the principal and received at the office of the company between the date of the original meeting and the date on which poll was taken: *Held*, as the meeting at which the poll was to be taken was a continuation of the original meeting, the intimation revoking the proxy was not received before the meeting, and the vote given by the proxy was valid (83).

**823. Non-member's vote :—**An article which provides that every vote not disallowed at the meeting shall be valid will validate a vote, not objected to at the meeting, given by a proxy who is not a shareholder (84).

**824. Corporation's right :—**The requirements as to the appointment of proxies by corporations being under seal applies only to corporations having a seal according to English law (84). A corporation may give a proxy under the English law (85). See notes to s. 187.

**825. Lodgment of proxy paper :—**Where the articles provided "that the instrument appointing a proxy shall be deposited at the registered office of the company, not less than two clear days before the day for holding the meeting," proxies lodged after the date of an original meeting, but more than two days before the day fixed for an adjournment thereof, could not be used for the purpose of voting at the adjourned meeting (86).

**826. Where no time is fixed :—**If the articles do not provide that proxy papers shall be deposited at the office before the meeting, the vote of the proxy is to be accepted even if he cannot produce the proxy paper at the time (87).

(82) *Narayana v. Kalleswarar Mills Ltd.*, *supra*.

(83) *Spiller v. Mayo (Rhodesia) Development Co.* [1926] W.N. 78.

(84) *Colonial Gold Reef v. Free State Rand* [1914] 1 Ch. 582.

(85) *Indian Zoedone Co.* [1884] 26 Ch. D. 70, 78; cf. *Queen v. Samuel* [1895] 1 Q.B. 815.

(86) *Mc Laren v. Thomson* (*supra*); see also *Shaw v. Tati Concessions* [1913] 1 Ch. 292.

**827. Where two proxies :—**Where one proxy is lodged before the expiry of the time and another proxy in favour of another person is lodged after the expiry of the time, the first proxy is not revoked (88).

**828. Filling up names etc. :—**So long as a proxy is properly stamped at execution, its operative parts, e.g., the name of the proxy and the date of the meeting may be filled in afterwards by any person authorized to do so (89), even though at the time of execution the date of the meeting has not been fixed (90). The secretary may fill in the date in the proxy form after it has been returned by the shareholder (91). Undated proxies are valid (92).

**829. Cancellation of stamp :—**Any cancellation which renders the stamp on proxy incapable of being used is sufficient. It is not necessary that the person cancelling the stamp should write his name and the date across the stamp (93).

**830. Costs may be paid out of company's fund :—**The cost of obtaining signature of proxy papers and of stamp might be paid out of the company's funds (94) if reasonably necessary in the interest of the company. But the principle would not apply if it was done to serve the interest of the directors personally (94). See however sub-s. (4) of the present section.

**831. Director's name :—**Directors' names might be inserted as proxies (95) unless there was some provisions in the articles to the contrary (96).

**832. Stamps :—**Where a proxy empowers any person to vote at any one general meeting of a company, it may be stamped with an adhesive stamp of two annas (97). For this purpose revenue stamp only is to be used (98) or in the case of a company having a large number of shareholders coloured impression may be obtained from the Collector of Stamps (99). The instrument of proxy to vote "at any ordinary or extraordinary general meeting of the company" and not merely at the particular meeting is valid (1). But in that case it would be chargeable for stamp duty as a power of attorney under Art. 48 of the Indian Stamp Act. The stamp on a proxy to be used at a creditor's meeting is the same as in the case of a general meeting of the members of a company (2).

Where the proxy contained the specific power as well as the general power, it would be admissible only if the aggregate amount of the duties in respect of two

(87) *English, Scottish & C. Bank* [1893] 3 Ch. 385.

(88) *Tata Iron & Steel Co.* [1828] B. 80, 30 Bom. L.R. 197.

(89) *Ernest v. Loma Gold Mines* [1897] 1 Ch. 1; *Sandgrave v. Bryden* [1907] 1 Ch. 318; *Ex p. Lancaster* [1877] 5 Ch. D. 911.

(90) *Sandgrave v. Bryden* (supra).

(91) *Ernest v. Loma Gold Mines* (supra), overruling *Bidwell Bros.* [1893] 1 Ch. 603.

(92) *Tata Iron & Steel Co.* (supra); but see *Llewellyn v. Kasintoe Rubber Estates* [1914] 2 Ch. 670.

(93) *Mc Mullen v. "Sir Hickman" Steamship Co.* [1902] 71 L.J. Ch. 766, 18 T.L.R. 650.

(94) *Peel v. London & N. W. Ry. Co.* [1907] 1 Ch. 5, overruling *Studdert v. Grosvenor* [1886] 33 Ch. D. 528.

(95) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197.

(96) *English, Scottish & C. Bank* (supra).

(97) Art. 52, Indian Stamp Act, 1899 as amended by Act 43 of 1923.

(98) Vide Rule 13 and the new Rule 16 of the Rules framed under the Stamp Act, and Notification No. 3 dated 31st March, 1934.

(99) Vide Rule 8, *ibid.*

(1) *Isaacs v. Chapman* [1915] W.N. 413.

(2) Vide notification dated 12th January, 1926 published in the Gazette of India, 1926, Part I, p. 132.

such separate instruments is paid, even if both the parts are separable (3). Where the proxy form authorised the proxy to vote not only at a particular general meeting or at any adjournment thereof, but also at any meeting of the company generally, it was held that the document fell within cl. (g) of Art. 48 of the Stamp Act (3).

**833. Proxy is agent for voting** :—A person to whom a member gives a proxy is that member's agent for the purpose of voting. The authority of an agent may be revoked expressly or by implication; but unless and until it is so revoked that authority continues. If a man is present and allows another to act for him, presumably he approves what that other does (4). But even where a proxy had not been validly revoked in accordance with the articles, the shareholder who had given the proxy is free to attend at the meeting and vote personally; and when he has done this the vote tendered by the proxy will be rejected. "It would be strange", observed Lord Hanworth, M. R., "if a person in the position of an agent could say to his principal 'you have entrusted to me a power which I will not allow to pass back to you, although you demand the right to exercise it'" (5). Where persons who voted on the amendments, but did not vote on the substantive proposition, but whose votes on the latter were recorded by their proxies it was held that the votes were good (6).

**834. Unstamped proxies** :—Those proxies which are unstamped or upon which the stamps have not been cancelled must be excluded. Any votes recorded on the authority of such proxies go out (6).

See notes to s. 166.

**836. Attestation** :—If the articles require that a proxy paper shall be attested, an unattested proxy paper will be rejected (7).

**837. Where form is settled by Court** :—Where the form of proxy was settled by the Court, but a certain word was entered by the member signing the proxy and he added other words, but the added words were too vague to have any meaning, it was held that votes given by the proxy were good (8).

For Rules, see notes under s. 170.

**177. Voting to be by show of hands in first instance.**—At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 179, be decided on a show of hands.

SS. 177 and 178 are based on reg. 56 of Table A of the previous Act.

See notes to the next section. See also reg. 58 of Table A of the English Act of 1948.

**837A. Who can vote upon a show of hands** :—Unless a poll is demanded, votes of members who are personally present will be counted by a show of hands (9). A member present only by proxy has no right to vote upon a show of hands

(3) *Narayana v. Kalceswarar Mills Ltd.* [1952] M. 515.

(4) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197, 108 I.C. 465. *Viswanathan v. Tiffin's B. A. & Paints Ltd.* [1953] M. 520, [1953] 1 M.L.J. 346.

(5) *Cousins v. International Bricks Co.* [1931] 2 Ch. 90 (101), 47 T.L.R. 217.

(6) *Tata Iron & Steel Co.* (supra) following *London Joint Stock Bank v. Simmons* [1892] A.C. 201.

(7) *Harben v. Phillips* [1883] 23 Ch. D. 14, 22, 31.

(8) *Tata Iron & Steel Co.* (supra).

(9) *Hornbury Bridge Co.* [1879] 11 Ch. D. 109.



(10). A company present by a representative under s. 187 will be deemed to be present in person (11). During a state of war an alien enemy cannot vote (12).

**837B. Vote is a right to property** :—A shareholder's vote is a right to property and he is entitled to exercise it as he pleases even in a manner adverse to what others may think the interests of the company (13), provided his vote be *bona fide* and not contrary to public policy (14). "Unless otherwise provided by the regulations of the company", observed Lord Davey in *Burland v. Earle* (15), "a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote."

Where a shareholder's name remained on the register of members not withstanding his bankruptcy, he was entitled to attend the meeting and to vote in person or by proxy (16).

Where a shareholder is not allowed to vote, even by the majority of shareholders present at the meeting, a suit for declaration that he is entitled to vote is maintainable and the ordinary civil Court has jurisdiction to entertain it (17).

**837C. Right of voting**:—Where shares have been transferred to a mortgagee and are registered in his name, he has, as legal owner of the shares, the right of voting which may be exercised as he thinks best, irrespective of any direction by the mortgagor (18). The right can only be determined by an express contract not to exercise it, and in the case of debentures it may be exercised for the debenture-holders (18). A mandatory injunction may however be granted to enforce an agreement by the mortgagee of share to vote in accordance with the wishes of the mortgagor (19).

**837D. Executor's vote** :—Vote given by an executor on behalf of a deceased member must be disallowed unless he has got himself registered as a member, and it is not possible to distinguish the case of a liquidator or receiver (20).

**837E. No subsequent ratification** :—A vote is good or bad at the time when it is recorded and no subsequent ratification can cure the defect (20).

**837F. Director's right to vote** :—Although a director is not entitled to vote as a director in respect of any contract in which he is interested (21), yet he is entitled so to vote as a shareholder at a general meeting (22).

A single shareholder may sue the company to enforce his right to have his vote recorded (23).

(10) *Ernest v. Loma Gold Mines* [1896] 2 Ch. 572, [1897] 1 Ch. 1 overruling *Bidwell Brothers* [1893] 1 Ch. 603.

(11) *Kelanton Estates* [1920] W.N. 274, 64 S. J. 700.

(12) *Robson v. Premier Oil Co.* [1915] 2 Ch. 124.

(13) *Greenwell v. Porter* [1902] 1 Ch. 530; *Puddephatt v. Leith* [1916] 1 Ch. 200; *Pender v. Lushington* [1877] 6 Ch. D. 70; *E. D. Sassoon & Co. v. Patch*, *infra*.

(14) *Elliot v. Richardson* [1870] 5 S. C. P. 744; *Northwest Transportation Co. v. Beatty* [1887] 12 App. Cas. 589, 593; *Burland v. Earle* [1902] A.C. 83, 94.

(15) [1902] A.C. 83 (P.C.); see also *North West Transportation Co v Beatty* [1887] 12 App. Cas. 589.

(16) *Morgan v. Gray* [1953] 1 A.E.R. 213.

(17) *Gobinda v. Akshoy* [1906] 10 C.W.N. 206.

(18) *Siemens Brothers v. Burns* [1918] 2 Ch. 324.

(19) *Puddephatt v. Leith* (*supra*). See in this connection *E. D. Sassoon & Co. v. Patch* [1922] 45 Bom. L.R. 46.

(20) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197; but see *Llewellyn v. Kasintoe Rubber Estates* [1914] 2 Ch. 670.

(21) S. 300.

(22) *East Pant Du Mining Co. v. Merryweather* [1864] 2 H. & M. 254; cf. *North-West Transportation Co. v. Beatty* (*supra*).

(23) *Pender v. Lushington* (*supra*).

**837G. Casting vote** :—"Where the number of votes on a show of hands is equal, the chairman has no casting vote by common right" (24), but the casting vote has been given to a chairman on a show of hands or on a poll by reg. 54 of Table A.

See notes to ss. 166 and 189.

**837H. Right of splitting** :—Joint-holders are entitled to have their holdings split into two or more joint holdings with the names in different order so as to enable all to attend and vote (25).

For Rule, see notes under s. 170.

**178. Chairman's declaration of result of voting by show of hands to be conclusive**.—A declaration by the chairman in pursuance of section 177 that on a show of hands, a resolution has or has not been carried, or has or has not been carried either unanimously or by a particular majority, and an entry to that effect in the books containing the minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes cast in favour of or against such resolution.

This section corresponds to Reg. 56 of the old Table A and reg. 58 of the English Table A. Some verbal changes have been made in this section by the Joint Committee.

See notes to s. 177.

**838. Proper mode of declaring company's will** :—A resolution of the majority of members present at a meeting is the proper mode of declaring the will of the corporation; but if the shareholders, and not a majority only, expressly assent, the absence of a resolution may be immaterial (26). As to what is an act of the corporation binding the corporation and what constitutes a meeting of the corporation see the case noted below (27) and notes to s. 166.

**839. Show of hands** :—As regards the importance of a regular show of hands recently stressed by Lord Blanesburgh in the House of Lords, see notes to s. 189.

**840. Declaration of chairman** :—Declaration of the chairman as evidenced by an entry in the minute book is conclusive evidence of the fact that a resolution has, on a show of hands, been carried. In any case the declaration of the chairman is *prima facie* evidence (28). Where on a show of hands there are two resolutions before a meeting of shareholders—one for the reduction of capital and another for the conversion of the preference shares into ordinary shares—and where there is a right to a poll, the chairman may put the resolutions *en bloc*, if no shareholder requires him to put them separately (29). A chairman giving a decision *bona fide* without malice cannot be mulcted in damages, because a Court subsequently found that he had given a wrong decision (30).

(24) Palmer 13th ed., p. 173.

(25) Burns v. Siemens Brothers [1919] 1 Ch. 225.

(26) Wenlock v. River Dee Co. [1887] 36 Ch. D. 675 n; Express Engineering Works [1920] 1 Ch. 466.

(27) Staple of England v. Bank of England [1850] 12 Beav. 433 and the cases cited there.

(28) Wandsworth & Putney Gas Co. v. Wright [1870] 22 L.T. 404

(29) R. E. Jones, Ltd. [1933] 50 T.L.R. 31.

(30) Ram Narain v. Ram Kishen [1911] 10 I.C. 515, 46 P.R. 1911.

The ruling of a chairman given at one stage of a meeting is final and binding on the chairman or his successor at a later stage (31). Thus if the chairman in the exercise of his powers comes to a decision as to whether the votes given on proxy which are in question shall be disallowed or not on the ground of insufficiency or sufficiency of stamp, and if that decision is not vitiated by fraud or misconduct on his part, that decision is binding on himself or his successor at a later stage of the same meeting (31).

**841. Chairman's duty :—**The duty of a chairman of a meeting is to ascertain the sense of the meeting upon any resolution properly coming before the meeting (32). The power to demand a poll is a power possessed by the chairman which is to be exercised or not according to his decision whether it is necessary to exercise the power in order to ascertain the sense of the meeting. In order to ascertain that sense the chairman ought to demand a poll and use the proxies held by him. Where he did not do so, the resolution passed at the meeting was held to be invalid (32).

If the chairman unjustly and without the consent of the shareholders stops the meeting and declares it dissolved, it is within the powers of the meeting to elect another chairman and conduct the business remaining unfinished (33). The chairman is entitled to give up his right to preside at a meeting (33).

**842. Prima facie evidence :—**The chairman of a general meeting has *prima facie* authority to decide all incidental questions which arise at such meeting. The entry by him in the minute book of the result of a poll or of his decision of such questions although not conclusive is *prima facie* evidence of that result or the correctness of the decisions and the onus of displacing that evidence is on those who impeach the entry (34).

**843. Conclusive evidence :—**The words "conclusive evidence" mean evidence which is not to be displaced and is conclusive as between the parties bound by the minutes (35).

**844. Shareholder's right to speak :—**A shareholder is not entitled to speak at a meeting as much as he pleases, but has a right to be heard in reasonable terms for a reasonable time (36). As to whether the denial of this right vitiates the resolution the proper test is to consider the facts and circumstances of each case (36).

**845. Point of order :—**A point of order which is a request to the chairman to hold that the meeting is not competent to consider and confirm an arrangement contained in the resolution and which is long enough to form a decent speech against the resolution is properly rejected as a point of order, as it is for the shareholders to consider whether to accept or reject the resolution (38).

**846. Amendments :—**Amendments can be allowed; but it must depend upon the nature of the resolution and the nature of the amendment, whether it could be or should allowed by the chairman (37). Any proper amendment should be put to the meeting for consideration, and if the chairman rules out any such amendment, the resolution is liable to be set aside (38). But if an amendment, though in form an amendment, is really a counter proposal of a different nature

(31) *Narayana v. Kalceswarar Mills Ltd.* [1952] M. 515.

(32) *Second Consolidated Trust, Ltd. v. Ceylon A. T. & R. Estates Ltd.* [1943] 169 L.T. 324.

(33) *Narayana v. Kalceswarar Mills Ltd.*, supra.

(34) *In re Alliance Bank* [1924] 40 C.L.J. 223.

(35) *Kerr v. John Mottram, Ltd.* [1940] Ch. 657.

(36) *Parashuram v. Tata Industrial Bank* [1925] 26 Bom. L.R. 987, [1925] B. 49.

(37) *Rebello v. Co operative & C. Trading Co.* [1925] B. 105, 26 Bom. L.R. 907.

(38) *Parashuram v. Tata Industrial Bank* [1923] 47 Bom. 915, 25 Bom. L.R. 1083.

involving either adjournment of the consideration of the resolution or rejection thereof or goes beyond the scope of the subject matter of the resolution, it should be ruled out (38).

**847. Votes :—**Under sub-s. (2) cl. (d) of the old s. 79 every member of a company originally having a share capital had one vote in respect of each share or each Rs. 100 stock held by him. But under reg. 60 of the old Table A on a show of hands every member present in person had one vote.

**848. Objections :—**A point of order objecting to the validity of votes tendered for a resolution must be handed to the chairman before he commences to take the poll; also it should be directed to the particular votes. It is futile for any member to raise a general objection without indicating the nature of the objection and without any attempt to particularize the votes objected to (39). The chairman may close the doors during the taking of the poll, if it is advisable under the circumstances of the case (40).

When the plaintiff disputes the validity of votes recorded at a meeting, he is entitled to inspection of the documents concerned. But when such inspection will cause delay and when the plaintiff cannot show that the inspection would yield any result in his favour, refusal of inspection is not wrong so far as to merit reversal by the superior Court (39).

**849. Proxy :—**A person to whom a member gives a proxy is that member's agent for the purpose of voting. The authority of an agent may be revoked expressly or by implication, but unless and until it is so revoked that authority continues. If a man is present and allows another to act for him, presumably he approves what that other does (41). Where persons who voted on the amendments proposed, but did not vote on the substantive proposition, but whose votes thereon were recorded by their proxies in a meeting of the company held for changing its memorandum, it was held that these votes were good (41). Undated proxies are valid (41). A signed a proxy in favour of B. The time for lodging proxies ended two days before the meeting. The proxy was lodged in time. A then signed a second proxy in favour of C and lodged it after the expiry of the time and was rejected without scrutiny: *Held* that the first proxy was not revoked (41).

The chairman has discretion in moving that "the question be now put" (42).

**850. Amendment of resolution :—**An amendment fairly arising on a resolution which is specified in the notice of the meeting must be put to the meeting, and the chairman has no right to refuse it (43).

Amendments to propositions must be germane to the subject matter of the proposition and they must not be in substance a direct negative of it (44). In pursuance of a notice a general meeting of a company was convened, among other purposes, to "receive the report of the managing committee and the audited balance sheet and the income and expenditure account for the year 1943 and to approve and adopt the same." The chairman himself moved that the aforesaid items be received and adopted. The proposition was duly seconded and thereupon one of the members proposed an amendment to the effect that the items referred to should be received but not adopted and that a committee should be appointed to look into them and the accounts and to report thereon. The question was whether the chair-

(39) *Parashuram v. Tata Industrial Bank* [1923] 47 Bom. 915, 25 Bom. L.R. 1083.

(40) *Rebello v. Co-operative &c. Trading Co.* [1925] B. 105, 26 Bom. L.R. 907.

(41) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197, 108 I.C. 465.

(42) *Wall v. London A. Corpn.* [1898] 2 Ch. 469.

(43) *Torbock v. Westbury* [1902] 2 Ch. 871; *Betts & Co. v. Macnaghten* [1910] 1 Ch. 430.

(44) *T. A. Vakil v. Bombay Presidency Radio Club, Ltd.* [1945] B. 175, 47 Bom. L.R. 428.

man was right or not in ruling this amendment out of order. *Held* that the amendment satisfied the aforesaid test and it was competent for the company to appoint what would in effect be an informal committee of inspection, because the committee, if so appointed, would not have the powers which were conferred on a committee appointed as contemplated by s. 142 of the old Act, or as conferred on Government inspectors of companies, and the chairman was therefore wrong in ruling the amendment out of order (44). It was further held that where the chairman improperly ruled out of order a proposed amendment and refused to put it to the meeting, subsequent proceedings of the meeting to that particular motion were invalidated (44).

Where an amendment which a party has a right to move has been rightly and properly dealt with by the chairman, the validity of the resolution as passed remains unaffected (45).

For Rule, see notes under s. 170.

**179. Demand for poll.**—(1) Before or on the declaration of the result of the voting on any resolution on a show of hands, a poll may be ordered to be taken by the chairman of the meeting of his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the persons or person specified below, that is to say,—

(a) in the case of a public company, by at least five members having the right to vote on the resolution and present in person or by proxy,

(b) in the case of a private company, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy if more than seven such members are personally present,

(c) by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution, or

(d) by any member or members present in person or by proxy and holding shares in the company conferring a right to vote on the resolution, being shares on which an aggregate sum has been paid up which is not less than one-tenth of the total sum paid up on all the shares conferring that right.

(2) The demand for a poll may be withdrawn at any time by the person or persons who made the demand.

This section is based on s. 79 (1) (c) of the redraft suggested by the C. I. C. at pages 348 and 349 of their Report. See also s. 137 of the English Act of 1948—*Notes on Clauses*.

See s. 79 (1) (c) of the previous Act.

(45) *Rebello v. Co operative N. & T. Co.* [1925] B. 105, 26 Bom L.R. 907.

**851. Taking of poll :—**Proxies cannot be used on a show of hands (46). A poll is a mere continuance of the meeting at which it was demanded (47). The chairman is justified in closing the doors during the taking of the poll, if it is not an ordinary meeting but a meeting in which special precautions are necessary in view of the conflict between two groups (47).

At common law a person entitled to vote at a meeting has the right to demand a poll (48). Where there is such a right it can be exercised immediately after the chairman's declaration on the result of the show of hands (49).

**852. Demanding poll :—**Where the power of demanding a poll is by the articles given to shareholders qualified to vote and holding so many shares, the power is exercisable only by the shareholders present in person: for the holder of proxies is not the holder of the shares included in the proxy (50). A proxy authorizing a person to vote does not authorize him to demand a poll (51), unless the articles otherwise provide.

Where members holding a specified number of shares have the right to demand a poll under the articles and there is a definition clause stating that the singular includes the plural, one member holding the requisite number of shares can demand a poll (52).

The demand for a poll is too late if it is not made upon the declaration of the show of hands (53).

**853. Who can vote on poll :—**Under a form of articles as in Reg. 56 of the old Table A members not present at the meeting could not vote on the poll, even if taken subsequently (54). Under an article providing that the poll shall be taken "in such manner as the chairman shall direct," the poll may be taken then and there (55).

If the articles contemplate voting in person the chairman can direct the taking of a poll by voting papers (56).

**854. Separate polls :—**Where resolutions are voted upon separately and polls are demanded, there must be separate polls (57). Any qualified person may demand a poll (58).

**855. Validity of votes :—**Where an article provided that votes tendered at a meeting and not disallowed at that meeting or an adjournment thereof should be deemed valid for all purposes, in the absence of fraud or *mala fides*, votes not so disallowed could not be afterwards challenged in legal proceedings (59). Where an article provides that no objection should be made to the validity of any vote except at the meeting and that every vote, whether given in person or by proxy, not dis-

(46) *Ernest v. Loma Gold Mines* [1906] 2 Ch. 572.

(47) *Queen v. Wimbledon Local Board* [1882] 8 Q.B.D. 459, 464; *R. v. D'Oyly* (supra).

(48) *Sec Rebello v. Co-operative & Co.*, supra.

(49) *Campbell v. Maund* [1836] 5 A. & E. 865.

(50) *Queen v. Govt. Stock Investment Co.* [1878] 3 Q.B.D. 442.

(51) *Haven Gold Mining Co.* [1882] 20 Ch. D. 151, 157.

(52) *Siemens Bros. v. Burns* [1918] 2 Ch. 324. As to counting joint holders on a demand for a poll see this case and *Cory v. Reindeer S. S. Ltd* [1915] 31 T.L.R. 530.

(53) *Queen v. Thomas* [1883] 11 Q.B.D. 282.

(54) *Shaw v. Tati Concessions* [1913] 1 Ch. 292; *R. v. D'Oyly* (supra); but see *Horbury Bridge Co.* [1879] 11 Ch. D. 109.

(55) *Chillington Iron Co.* [1885] 29 Ch. D. 159.

(56) *Mc Millan v. Le Roi Co.* [1906] 1 Ch. 331.

(57) *Blair Open Hearth Furnace Co. v. Reigart* [1913] 108 L.T. 665, 29 T.L.R. 449.

(58) See *Queen v. Wimbledon L. Board*, supra.

(59) *Wall v. London & Northern Corpn.* [1899] 1 Ch. 550; *Wall v. Exchange Investment Corpn.* [1926] Ch. 143, (C.A.).

allowed at any meeting, should be deemed valid for all purposes, the decision of the chairman who in the *bona fide* exercise of the power conferred upon him by the articles refuses to disallow a vote by proxy to which objection is taken at the meeting is final and will not be reviewed by the Court (60).

**856. Right to inspect voting papers :—**Where the articles give the shareholder the right to inspect the papers relating to the voting, the Court should ordinarily give them an opportunity of doing so. Such an opportunity need not however be given when it appears that the inspection would not yield any useful result (61).

**857. Meeting under Court's order :—**Where a meeting is held under the order of the Court, the chairman is bound to carry out the instruction given by the Court and has a discretion of his own for matters lying outside the scope of such instructions (61). In the last cited case *Fawcett J.* held that inspection of ballot papers could not be obtained without an express order of the Court. Strong grounds must be shown, and the Judge must be satisfied that the application for it was made *bona fide*.

For Rule, see notes under s. 170.

**180. Time of taking poll.—**(1) A poll demanded on a question of adjournment shall be taken forthwith.

(2) A poll demanded on any other question (not being a question relating to the election of a chairman which is provided for in section 175) shall be taken at such time not being later than forty-eight hours from the time when the demand was made, as the chairman may direct.

This section is based on reg. 59 of Table A of the previous Act. A maximum time limit for taking the poll has been laid down in sub-s. (2) *viz.* that it should be taken not later than 48 hours from the time when the demand for poll was made ---Notes on Clauses.

**858. Time of taking poll :—**The requirements of Reg. 59 in Table A of the old Act that a poll on any adjournment should be taken immediately meant that the poll was to be taken as soon as practicable in all the circumstances. As it was impossible for physical reasons to go on with the meeting on January 20, any meeting convened to hear the result of the poll and to continue with the business of the meeting would be a continuation of the previous meeting and therefore any proxies deposited after midday of January 18 would not be valid (62).

The taking of a poll is not a meeting of the company in the strict sense, but is in law a continuation of the meeting at which the poll was directed to be taken (62). Where there is a breakdown of the arrangement of the poll on the fixed date, that does not put an end to the taking of the poll, because there must be at least a reasonable opportunity to the voters of having the poll taken. The chairman should in such circumstances appoint another date for the poll, because if the poll is demanded it must be taken even though the chairman refuses to grant the poll (63). The Court has jurisdiction to entertain a suit by the shareholders against the company in respect of the infringement of their rights when the interests of justice require it (63). But a mandamus will not be issued unless it appears in evidence

(60) *Wall v. Exchange Investment Corpn.* (supra).

(61) *Rebello v. Co-operative &c. Co.* [1925] B. 105, 26 Bom. L.R. 907.

(62) *Jackson v. Hamlyn* [1953] 1 A.E.R. 887.

(63) *Srinivasan v. Watrap* [1932] M. 100.

that some qualified person who meant to vote was prevented from doing so, as a result of taking the polls with closed doors (64).

For Rule, see notes under s. 170.

The original cl. 172 of the Bill dealing with the voting rights of members on a poll has been omitted by the Joint Committee as being unnecessary (*vide* J. C. R., para 71).

**181. Restriction on exercise of voting right of members who have not paid calls etc.**—Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has and has exercised any right of lien.

This section is based on clause (f) of the new s. 79 (1) suggested by the C. L. C. at pages 349 and 350 of their Report—*Notes on Clauses*.

See reg. 63 of Table A of the old Act and reg. 65 of Table A of the English Act of 1948.

This was originally cl. 173 of the Bill. In order to avoid any possible conflict with other provisions of the Bill, the words "Notwithstanding anything contained in this Act" have been added by the Joint Committee at the commencement of this section (*vide* J. C. R., para 72).

**859. Right after forfeiture** :—As to whether after forfeiture, the new holder's right to vote is affected by a call made on the last holder see *New Balkis Eerstelling v. Randt Gold Mining Co.* (1903) 1 K.B. 461. [1904] A.C. 165.

For Rule, see notes under s. 170.

**182. Restrictions on exercise of voting right in other cases to be void.**—A public company, or a private company which is a subsidiary of a public company, shall not prohibit any member from exercising his voting right on the ground that he has not held his share or other interest in the company for any specified period preceding the date on which the vote is taken, or on any other ground not being a ground set out in section 181.

This section is new. It is consequential on cl. 173 of the Bill (now s. 181) and makes it plain that a public company or a private company which is subsidiary of a public company should not put any restriction on voting except the one specified in s. 181—*Notes on Clauses*.

**859A.** Compare s. 79 (1) (c) of the previous Act under which it has been held that that cl. (e) overrode any provision in the articles of a company and a shareholder could not be prevented from voting on the ground that his name had not been on the register of the company for a period specified in the articles (65).

For Rule, see notes under s. 170.

(64) *Queen v. Rector* [1838] 8 Ad. & E. 856.

(65) *Anathalakshmi v. Hindustan Investment &c. Trust* [1951] M. 927, [1951] M.W.N. 432.



ing of such meeting, had become "impracticable" within the meaning of this sub-section, although the time limit mentioned in sub-s. (1) of s. 76 (of the old Act) had not expired (69). In coming to this conclusion the Full Bench held as follows: (1) The question of impracticability must be decided primarily in the light of the articles, unless they contravene any mandatory provision of the Act; (2) as in this case the articles did not do so they were binding in the matter and (3) the fact that a meeting might have been called with the consent of all the members after the time limit under the articles and before the expiry of the time under s. 76 (1) (of the old Act) did not affect the question for the purpose of s. 79 (3) (of the old Act) (69).

While dealing with an application under sub-s. (1) the Court is not required to go into a consideration of the various allegations and counter-allegations regarding the management of the company. The only point for consideration is whether it has become "impracticable" to call a meeting of the company in the manner in which such meeting may be called as under its articles or under the Act (70). The Court cannot, however, overlook the attitude of the directors that they would not be willing to call a general meeting even though a requisition be filed in accordance with law (70). On the facts and circumstances of the last cited case it was held impracticable to have a general meeting without a crop of litigations being started and the interest of the company as a whole being seriously jeopardised. Hence direction was issued for the holding of an extraordinary general meeting under s. 79 (3) of the previous Act.

**867. Court's jurisdiction** :—Where upon the jurisdiction of the Court under sub-s. (1) of this section being invoked by a party, a question is raised as to the validity or otherwise of a meeting, the Court has jurisdiction to determine that question (69). In the last cited case it was held that the jurisdiction of the Court was rightly invoked by the President of the Council who was in charge of the management of the company.

**867A. Appointment of chairman** :—An election of directors cannot be called a formal subject where there are factions in the shareholders. In such a case the Court can appoint an independent chairman to preside over the general meeting. The power given to the Court by ss. 76 and 79 (3) of the old Act to call a general meeting included also a power to appoint a person to preside over it (71).

The Court would not be justified in granting an adjournment of the annual general meeting merely because it has appointed an independent chairman of the meeting (72).

For Rule, see notes under s. 170.

**187. Representation of corporations at meetings of companies and of creditors.**—(1) A body corporate (whether a company within the meaning of this Act or not) may—

(a) if it is a member of a company within the meaning of this Act, by resolution of its Board of directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company,

(69) *Balkrishna v. Uma Sankar* [1947] A. 361 (F. B.), [1947] A. L.J. 337.

(70) *India Spinning Mills* [1955] N.U.C. 1015 (Cal.) per R. P. Mookerjee. J.

(71) *Anantalakshmi v. Tiffin's B. & C. Ltd.* [1952] M. 60.

(72) *Anantalakshmi v. Hindustan Investment &c. Trust* [1951] M. 927, [1951] M.W.N. 432.

or at any meeting of any class of members of the company ;.

(b) if it is a creditor (including a holder of debentures) of a company within the meaning of this Act, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

(2) A person authorised by resolution as aforesaid shall be entitled to exercise the same rights and powers (including the right to vote by proxy) on behalf of the body corporate which he represents as that body could exercise if it were a member, creditor or holder of debentures of the company.

This section is based on s. 80 of the previous Act and s. 139 of the English Act of 1948. The provisions of s. 80 have been amplified on the lines of the English section—*Notes on clauses*.

The C. L. C. at page 250 of their Report observe: "The amendment makes the provision of s. 80 applicable to all bodies corporate irrespective of whether they are companies within the meaning of this Act or not and also enlarges the scope by extending it to creditors of companies or corporations." The section makes "it clear that the person authorised under this section can act as the representative of the corporation in all the matters specified in the resolution authorising him to exercise the powers on behalf of the corporation which he represents."

**868. Rights of a representative** :—A person appointed under this section as a representative can be taken into account in considering whether or not there is a quorum of shareholders present (73). A vote given by such a representative can be properly admitted by the chairman of the meeting on the evidence afforded by a copy of the authorizing resolution (74).

**869. Does not apply to foreign companies** :—The power given by this section cannot be exercised by a foreign corporation (75); for the word company means a company formed and registered under this Act or a previous Act of the Indian legislature (76).

**188. Circulation of members' resolutions.**—(1) Subject to the provisions of this section, a company shall, on the requisition in writing of such number of members as is hereinafter specified and (unless the company otherwise resolves) at the expense of the requisitionists,—

(a) give to members of the company entitled to receive notice of the next annual general meeting, notice

(73) *Colonial Gold Reef v. Free State Rand* [1914] 1 Ch 382.

(74) *Kelantan Coco Nut Estates* [1920] W.N. 274, 64 S.J. 700.

(75) *Blair Open Hearth Furnace Co. v. Reigart* [1913] 108 L.T. 665, 29 T.L.R. 449.

(76) See s. 3, sub-s. (1), clauses (i) and (ii).

of any resolution which may properly be moved and is intended to be moved at that meeting ;

(b) circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than one thousand words with respect to the matter referred to in any proposed resolution, or any business to be dealt with at that meeting.

(2) The number of members necessary for a requisition under sub-section (1) shall be—

(a) such number of members as represent not less than one-twentieth of the total voting power of all the members having at the date of the requisition a right to vote on the resolution or business to which the requisition relates ; or

(b) not less than one hundred members having the right aforesaid and holding shares in the company on which there has been paid up an aggregate sum of not less than one lakh of rupees in all.

(3) Notice of any such resolution shall be given, and any such statement shall be circulated, to members of the company entitled to have notice of the meeting sent to them, by serving a copy of the resolution or statement on each member in any manner permitted for service of notice of the meeting ; and notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company :

Provided that the copy shall be served, or notice of the effect of the resolution shall be given, as the case may be, in the same manner and, so far as practicable, at the same time as notice of the meeting, and where it is not practicable for it to be served or given at that time, it shall be served or given as soon as practicable thereafter.

(4) A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless—

(a) a copy of the requisition signed by the requisitionists (or two or more copies which between them contain the signatures of all the requisitionists) is deposited at the registered office of the company—

(i) in the case of a requisition requiring notice of

a resolution, not less than six weeks before the meeting;

(ii) in the case of any other requisition, not less than two weeks before the meeting; and

(b) there is deposited or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect thereto :

Provided that if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called for a date six weeks or less after the copy has been deposited, the copy, although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.

(5) The company shall also not be bound under this section to circulate any statement if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter; and the Court may order the company's costs on an application under this section to be paid in whole or in part by the requisitionists, notwithstanding that they are not parties to the application.

(6) A banking company shall not be bound to circulate any statement under this section, if, in the opinion of its Board of directors, the circulation will injure the interests of the company.

(7) Notwithstanding anything in the company's articles, the business which may be dealt with at an annual general meeting shall include any resolution of which notice is given in accordance with this section, and for the purposes of this sub-section, notice shall be deemed to have been so given, notwithstanding the accidental omission, in giving it, of one or more members.

(8) If default is made in complying with the provisions of this section, every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

This section is new. It is based on s. 140 of the English Act of 1948. It supplements the provisions of s. 169. The C. I. C. observe : "We consider that this section should be supplemented by a suitable adaptation of s. 140 of the English Companies Act, 1948, which empowers a specified number of shareholders to make

use of the administrative machinery of a company to introduce resolutions on their own account at the annual general meeting and to inform other members of the purpose for which the resolutions are proposed to be introduced or the reasons for opposing any resolution submitted by the directors for consideration at the general meeting" (para 76, C.L.C.R.).

This was originally cl. 180 of the Bill. In sub-s. (4) (a) (ii) for "seven days" the Joint Committee have substituted "two weeks."

Sub-s. (6) exempting the banking companies has been inserted by the Lok Sabha.

**189. Ordinary and special resolutions.**—(1) A resolution shall be an ordinary resolution when at a general meeting of which the notice required under this Act has been duly given, the votes cast (whether on a show of hands, or on a poll, as the case may be,) in favour of the resolution (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the resolution by members so entitled and voting.

(2) A resolution shall be a special resolution when—

(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution ;

(b) the notice required under this Act has been duly given of the general meeting ; and

(c) the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be,) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, are not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

This section is based on s. 81 of the previous Act and s. 141 of the English Act of 1948, and para 78 of the C.L.C.R. which says : "The Indian Companies Act, 1913, envisages three types of resolution, an ordinary resolution, a special resolution and an extraordinary resolution . . . We see no reason why the extraordinary resolutions in these cases [s. 86G, s. 203 (c), s. 215 and some other sections] cannot be replaced by special resolutions. In our view, company meetings will be rendered much simpler by the abolition of extraordinary resolutions, and their replacement by special resolutions, except where we have recommended an ordinary resolution, wherever the present Act provides for the former."

This section was originally cl. 181 of the Bill, sub-cl. (3) and (4) of which have been omitted by the Joint Committee as being unnecessary.

**869A. Extraordinary resolution** :—S. 651 *post* provides: "Any reference to an extraordinary resolution in the articles of a company or in any resolution passed in

general meeting by the company or in any other instrument, or in any law in force immediately before the commencement of this Act shall, with effect on and from such commencement, be construed as a reference to a special resolution."

As to twenty-one days' notice for all general meetings, see s. 171 and notes thereto.

**870. Where a special resolution is necessary :—**A special resolution is necessary for the exercise of the following powers:—

To alter the provisions of memorandum of association, other than the conditions thereof as explained in sub-s. (2) of s. 16—s. 16 (3).

To alter the provisions of the memorandum so as to perform the acts mentioned in sub-s. (1) of 17—s. 17 (1).

To change the companies name—s. 21.

To change the name of a charitable company—s. 25 (3).

To alter or add to the company's articles of association—s. 31

To provide for the reserve liability of a limited company—s. 99.

To reduce the company's share capital in any way—s. 100.

To remove the company's registered office—s. 146 (2), Proviso.

To authorise payment of interest out of capital for construction of any work or building or provision of any plant—s. 208 (2).

To get the Central Government appoint inspector to investigate the company's affairs—s. 237 (a) (i).

To appoint persons connected with managing agents as directors—s. 261

To authorise payment of remuneration to directors in accordance with ss. 198 and 309—309 (1) and (4).

To authorise directors etc. to hold office of profit as provided in s. 314—s. 314 (1).

To alter the memorandum so as to render unlimited the liability of any director etc. specified in sub-s. (1) of s. 323—s. 323 (1).

To remove the managing agent from office for gross negligence or mismanagement of affairs of the company or of any subsidiary thereof—s. 338.

To sanction payment of additional remuneration to the managing agent in excess of the limits specified in ss. 198 and 348 to the managing agent—s. 352.

To sanction remuneration to the managing agent or his associate for sale of goods effected or any service rendered at a place outside India—ss. 356 (2) (b) and 357.

To sanction expenses (maximum amount) and remuneration payable to the managing agent or his associate for purchase of goods at a place outside India—s. 358 (3).

To approve of contract between the managing agent or his associate and the company for sale, purchase or supply of any property movable or immovable) or any other service or for under-writing of shares or debentures of the company—s. 360.

To authorise the company to make any loan, give guarantee or provide security in connection therewith to anybody corporate under the same management—s. 370 (1).

To permit the managing agent to engage in business competing with that of the managed company—s. 375 (1).

To have the company wound up by the Court—s. 433 (a)

To wind up the company voluntarily—s. 484 (1) (b)

To confer authority on the liquidator to accept shares etc. for transfer or sale of company's property—ss. 494 (1) and 507.

To sanction the exercise of powers by the liquidator in a member's voluntary winding up given by cls. (i) to (iv) of sub-s. (2) of s. 457 to a liquidator in a winding up by the Court—s. 512 (1) (a).

To bind the company by arrangement made under s. 517—s. 517 (1).

To sanction the exercise by the liquidator in a voluntary winding up of powers 'specified' in cls. (i) to (iii) of s. 546 (1)—s. 546 (1) (b).

To direct the disposal of books and papers of the company in a members' voluntary winding up—s. 550 (1) (b).

To adopt Table A in Schedule I in the case of registration of a company under Part IX of the Act—s. 578 (3) (a).

To alter the form of constitution of a company registered under Part IX of the Act—s. 579 (1).

**871. Validity of special resolution :—**Where the article of association of a company require a certain quorum before business can be proceeded with and a certain qualification in members for voting, and the Act requires certain formalities to be observed and a certain majority of votes to be obtained to give validity to certain resolutions, the requirements both of the Act and of the articles must be strictly observed, otherwise no binding resolution can be passed (77). A special resolution passed in conformity with the provisions of this section will be a valid one, even though the articles of the company contain further requirements which have not been complied with (78). The voting is in the first instance by a show of hands (79), proxies are only to be counted on a poll (80). Under the old sub-s. (2) at the second meeting no amendment could be put (81).

Under sub-s. (2) of s. 81 of the old Act (see now s. 171) the period of "not less than twenty-one days' notice" meant a period of not less than 21 clear days, exclusive of the day of service of the notice and exclusive of the day on which the meeting is to be held (82). Though it was permissible to refer to articles for the purpose of ascertaining the intention of the legislature in the body of the Act, it would not be proper to refer to Reg. 49 of Table A of the old Act in construing sub-s. (2) of s. 81 thereof (83).

Where a confirmatory meeting was convened for a date within the prescribed period and being duly held was adjourned to a date beyond the prescribed period, a confirmation at such an adjournment meeting was held to be valid on the ground that the adjourned meeting was a continuation of the original meeting (84). But a confirmatory meeting is no longer necessary.

Where the allegation was that the special resolution was not moved or put before the meeting for being voted upon and there was no record of the minutes as contemplated in s. 83 of the old Act, it was *held* that the burden of proof was upon the defendant (85).

**872. Votes, how taken :—**Unless a poll is demanded, the vote is by show of hands, and on such a show hands are to be counted and not the votes conferred by the shares represented (86). The ruling of the chairman that a resolution has been passed by show of hands cannot be challenged, if not challenged at the time (87). But if the chairman's declaration itself contains evidence that it is wrong, as for instance where the chairman states that he has taken proxies into account no poll having been demanded, it will not be conclusive (88). It has been held in England

(77) *Cambrian Peat &c. Co.* [1875] 31 L.T. 773.

(78) *Etheridge v. Central Uruguay Ry. Co.* [1913] 1 Ch. 425.

(79) *Horbury Bridge &c. Co.* [1879] 11 Ch. D. 109. The word majority in sub-s. (1) means numerical majority unless a poll is demanded : *ibid*

(80) *Ernest v. Loma Gold Mines* [1897] 1 Ch. 1.

(81) *Wall v. London & N. A. Corporation* [1898] 2 Ch. 469.

(82) *Hector Whaling, Ltd.* [1936] 1 Ch. 208 ; *Nagappa v. Madras Race Club* [1951] M. 831 (2), [1949] 1 M.L.J. 662.

(83) *Nagappa v. Madras Race Club*, *supra*.

(84) *Mc Millan v. Le Roy Mining Co.* [1905] 1 Ch. 331.

(85) *Nagappa v. Madras Race Club* [1951] M. 831 (2), [1949] Mad. 808.

(86) *Ernest v. Loma Gold Mines* [1897] 1 Ch. 1.

(87) *Arnot v. United African Lands Ltd.* [1910] 1 Ch. 518 (C.A.) ; *Hadleigh Castle Gold Mines* [1900] 2 Ch. 419, 422.

(88) *Patent Wood Keg Syndicate v. Pearce* [1906] W.N. 164, 50 S.J. 650.

that the declaration of the chairman under s. 51 of the Act of 1862 (89), that the special resolution has, on a show of hands, been carried is not conclusive evidence of the fact so as to preclude a shareholder from disputing the validity of the resolution by legal proceedings on the ground, for instance, that it has not been carried by the statutory majority (90). For the number of members who can demand a poll see s. 179.

Apart from fraud the chairman's declaration is conclusive (91), unless in making it he states the figures for and against and they show that he erroneously declared the resolution as duly passed (92). The last noted case has been distinguished by Blackwell, J. who has held that the chairman's declaration on a show of hands is conclusive and the minutes of the meeting are not admissible to prove the contrary (93).

**873. Rights of chairman at common law** :—At common law, and where the taking of a poll is not governed by statute or special rule, the chairman is the proper authority to fix the time and place for the taking of a poll, and a poll is properly and correctly taken immediately after the termination of the meeting (94). The same rule applies to meetings of registered companies, unless the articles prescribe some other procedure. The object of a poll is to ascertain the true sense of the meeting, and it is not to give the absent members a further opportunity of voting, unless a contrary intention is expressly or impliedly to be gathered from the articles of association. There is no presumption for construing a doubtful article in the latter sense (95).

The chairman must not declare that the poll shall be taken in any way inconsistent with the articles, e.g., by voting papers, because personal attendance of the voter or his proxy is necessary (96). When the poll is taken, each person voting signs a paper "for" or "against" the resolution and proxies are counted (97).

The maxim that a man cannot preside at his own election applies equally to company meetings. If he does so his election would be illegal (98).

**874. Demand for poll** :—If after rightful demand of a poll the poll is not taken, the resolution becomes void (99). A poll is a mere enlargement of the meeting at which it is demanded (1). If there are several resolutions before the meeting, they must not be put *en bloc* : each resolution must be put separately (2).

**875. Notice of meeting** :—Where an extraordinary resolution was proposed to be passed under the old Act the notice of the general meeting was not merely to indicate, but was actually to specify, the intention to pass the resolution as an extra-

(89) This corresponds to s. 69 of the Act of 1908, the only difference being that the words "as an extraordinary resolution" in the last but one line in sub-sec. (1) were not in the Act of 1862.

(90) *Young v. South African &c. Syndicate* [1896] 2 Ch. 268 ; *Betts & Co. v. MacNaghten* [1910] 1 Ch. 430.

(91) *Hadleigh Castle Gold Mines* [1900] 2 Ch. 419, overruling in effect *Young v. South African &c. Syndicate* [1896] 2 Ch. 268.

(92) *Re Caratal (New) Mines* [1902] 2 Ch. 498 ; but see *E. D. Sassoon United Mills* (infra).

(93) *E. D. Sassoon United Mills* [1929] B. 38, 30 Bom. L.R. 598 ; see also *Arnot v. United African Lands Ltd.* [1901] 1 Ch. 518.

(94) *Arnot v. United African Lands, Ltd.* [1901] 1 Ch. 518.

(95) *Liladhar v. Rahmubhoy* [1891] 15 Bom. 164.

(96) *Mc Millan v. Le Roy Mining Co.* [1906] 1 Ch. 331.

(97) *Topham's Company Law*, 5th ed., p. 212.

(98) *Nagappa v. Madras Race Club*, supra.

(99) *Queen v. Cooper* [1870] L.R. 5 Q.B. 457.

(1) *Queen v. Wimbledon Local Board* [1882] 8 Q.B.D. 459.

(2) *Patent Wood Keg Syndicate v. Pearce* (supra) ; *Re Caratal (New) Mines* (supra).

(3) *Mac Connel v. E. Prill and Co.* [1916] 2 Ch. 7.



ordinary resolution (3) ; and the exact resolution was to be set out in the notice (4). But reasonable amendments within the scope of the notice were permissible.

In the case of a special resolution the notice must state that it will be a special resolution (5). The notice must give sufficiently full and frank disclosure of the facts and the effect of the resolution. If that is not done, the resolution is inoperative and not binding upon the company (6).

Where the notice stated that a print of the proposed amended articles would follow shortly and a draft thereof was actually posted within 6 days of posting the notice, it was *held* that the notice substantially complied with the requirements of law (7).

Where there is a large body of shareholders who reside at great distances from the registered office of the company, it would not be fair to leave the proposed articles of association at the registered office and give the shareholders notice of that fact. Printed copies of the proposed new articles should be sent with the notice. Where this is not done, the notice cannot be held to disclose fully and frankly the facts upon which the shareholders are asked to vote (8).

**876. Shareholders' right to waive notice** :—It is competent for all shareholders acting together to waive the formalities required by this section as to the notice of intention to propose a resolution as a special resolution (9). A company however cannot by an ordinary resolution or by conduct make good an invalid special resolution, nor is it an objection to an action by a single shareholder to say that the company ought to be plaintiff on the ground that it can ratify the resolution, for this is not the case (10).

**877. Adjournment of meeting** :—Where a meeting held for the purpose of confirming a special resolution was adjourned for *bona fide* reasons to a date more than a month from the date of the meeting at which the extraordinary resolution was passed and the resolution was confirmed at the adjourned meeting, it was a valid special resolution ; for an adjourned meeting was a continuation of the previous meeting (11). The new sub-s. (2) of the old Act came into force on 15th January, 1937. So where a meeting for passing a special resolution was called by 7 days' notice according to the articles of the company fixing a date before 15th January, 1937 but the meeting on objection by some shareholders was adjourned to a date after the 15th January, 1937, the question was whether the resolution passed was a valid special resolution. It was held by the Peshwar Court that it was. The first meeting was regularly called because 7 days' notice was all that was required before the amendment came into operation. The second meeting was clearly a continuation of the first meeting which was adjourned. The fact that the section was amended in the meantime had no effect on the second meeting so far as the procedure for convening it was concerned. The resolution passed at the meeting was therefore in order. But as the old section was no longer law when the second meeting was held, the decision passed at that meeting became final and no further confirmatory meeting was necessary (12).

(4) *Ibid*, distinguishing *Penarth Pontoon &c. Co.* [1911] W.N. 240 56 S.J. 124.

(5) *Penarth Pontoon &c. Co.* (*supra*).

(6) *Narayanlal v. Maneckji Petit Manufacturing Co.* [1931] B. 354, 33 Bom. L.R. 556, 133 I.C. 829. In this case Baker J. reviewed all relevant authorities.

(7) *Nagappa v. Madras Race Club* [1951] M. 831 (2). [1949] Mad. 808.

(8) *Bimal Singh v. Muir Mills Co.* [1952] C. 645.

(9) See *Oxted Motor Co.* [1921] 3 K.B. 32.

(10) *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503.

(11) *Neuschild v. British Equatorial Oil Co.* [1925] Ch. 546.

(12) *Khattar Electrical Engineering &c.* [1938] Pesh 41.

**878. Notice by advertisement :—**In the case of notice by advertisement, the date on which the advertisement appears is the date from which the days are to be counted (13). The date on which the notice is given is excluded (14).

**879. "Not less than twenty-one days' notice :—**This expression means 21 clear days exclusive of the day of service and exclusive also of the day on which the meeting was to be held, *i.e.*, there must be an interval of 21 days in between the date of the meeting and the date of the service of notice (15). See sub-s. (1) of s. 171.

**880.** Under the proviso to s. 81 (2) of the old Act the requirement as to this 21 days' notice might be dispensed with by an agreement of all the members *entitled to attend and vote* and not merely of all the members entitled to vote and present in person or by proxy at the meeting. The proviso indicated the intention of the legislature that the provision in sub-s. (2) was mandatory and that it could be dispensed with only by the agreement of all members. An express consent of the members to waive the notice had to be established to sustain a plea of waiver of objection as to the legality of the notice (15). Now see sub-s. (2) of s. 171.

**881. Chairman's declaration :—**The conclusiveness of the declaration of the chairman attaches to the declaration where the chairman does not find by his declaration the figures for or against the resolution. But where he finds the figures and erroneously in point of law holds that the resolution has been duly passed, the resolution cannot be held to have been passed according to law (16).

**882. Show of hands :—**In such meetings the declaration by the chairman of the result of a show of hands is an essential preliminary basis for all subsequent procedure including the demand for and the taking of the poll (17). In the last cited case Lord Blanesburgh observed : "It is true that the chairman at the deferred shareholders' meeting said that only deferred shareholders were to hold up their hands. No one however can say, the chairman perhaps least of all, whether all of the shareholders present, not being deferred shareholders, were obedient to his command. . . . A show of hands is the constitutional method of declaring the will of a meeting. It stands as the resolution of the meeting, unless the declaration of the chairman that the proposed resolution is thereby carried or lost is subsequently displaced by the result of a poll thereafter duly demanded and taken. But from the very nature of the case there can, I suggest, be no valid demand for a poll unless there has been a valid show of hands."

**883.** A company's articles of association provided that at least seven days' notice of a general meeting should be given to the members, that such notice might be served on any member either personally or through the post in a letter addressed to him at his registered place of abode; and that if served by post it should be deemed to have been served at the time when the letter containing it would be delivered in the ordinary course of the post. The company passed a special resolution for alteration of its objects. Notices of the meeting had not been sent to five shareholders entitled to vote who lived and had their registered address in South Africa. *Held* that the meeting was duly convened in manner provided by the articles pursuant to s. 117 of the English Act of 1929 (corresponding to the present section) and that the special resolution was valid (18). It was further held that the decision of *Malins, V. C.* on exactly similar articles in *In re Union Hill Silver Co.*

(13) *Mercantile Investment Co.* [1893] 1 Ch. 484 n., 489 n.

(14) See *Goldsmith's Co. v. West Metropolitan Ry.* [1904] 1 K.B. 1.

(15) *Nagappa v. Madras Club* [1949] Mad. 808, 62 M.L.W. 341, [1949] 1 M.L.J. 662, [1951] M. 831 (2).

(16) *Dhakeswari Cotton Mills v. Nilkamal* [1937] C. 645, 41 C.W.N. 1137.

(17) *Carruth v. Imperial Chemical Industries* [1937] A.C. 707 (755).

(18) *In re Warden & Houtchiss, Ltd.* [1945] 1 Ch. 270 (C.A.).

*Ltd.* (19), that it was unnecessary to serve shareholders who lived and had their registered addresses abroad had stood unreversed for seventy-five years, and whatever would have been the decision of the Court had the case been *res integra* they would not now reverse a decision the reversal of which might result in casting doubt on titles to property (18).

**190. Resolutions requiring special notice.—(1)** Where, by any provision contained in this Act or in the articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less than twenty-eight days before the meeting at which it is to be moved, exclusive of the day on which the notice is served or deemed to be served and the day of the meeting.

(2) The company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one days before the meeting.

(3) If, after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date twenty-eight days or less after the notice has been given, then, notwithstanding anything contained in sub-sections (1) and (2), the notice, though not given within the time required by this section, shall be deemed to have been properly given for the purposes thereof.

This section is new. It is based on s. 142 of the English Act of 1948 and para 78 of the C. L. C. R. which recommends the incorporation of this section—*Notes on Clauses*.

The C. L. C. observe: "Following the provisions of s. 142 of the English Companies Act, 1948, we also suggest that in certain cases, which we have indicated in the Annexure of our Report and in the Addendum attached to it, a 'special notice' as defined in this section should be required. A 'special notice' of a resolution to be moved at a meeting of a company requires that the intention to move the resolution should be given to the company not less than twenty-eight days before the meeting at which it is moved and the company must give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting, or if that is not practicable, shall give the notice by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles not less than twenty-one days before the meeting. Under the English Act, a special notice is required in the case of a resolution to remove a director (s. 184) or to dispense with a director's age limit (s. 185), or to propose the appointment of an auditor other than the retiring auditor (s. 160)" (C. L. C. R., para 78).

Some verbal change has been made in this section by the Joint Committee.

**883A. Where special notice is required to be given** :—Under the present Act a special notice is required to be given—

For a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be re-appointed—s. 225 (1).

For any resolution appointing, or approving the appointment of, any person referred to in cls. (a) to (g) of sub-s. (1) of s. 261, as a director of the company. Any such notice given, to the company, and by the company to its members, must set out the reasons which make the resolution necessary—s. 261 (2) and (3).

For any resolution declaring that the age limit of 65 years shall not apply to a particular director. Notice of any such resolution given to the company, and by the company to its members must state or must have stated the age of such director—s. 281 (2) and (3).

For any resolution to remove a director under s. 284 or to appoint somebody instead of a director so removed at the meeting at which he is removed—s. 284 (2).

## **191. Resolutions passed at adjourned meetings.—** **Where a resolution is passed at an adjourned meeting of—**

- (a) a company ;
- (b) the holders of any class of shares in a company ; or
- (c) the Board of directors of a company ;

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

This section also is new. It is based on s. 144 of the English Act as recommended by the C. L. C.—*Notes on Clauses*.

**192. Registration of certain resolutions and agreements.—**(1) A copy of every resolution or agreement to which this section applies shall, within fifteen days after the passing or making thereof, be printed or typewritten and duly certified under the signature of an officer of the company and filed with the Registrar who shall record the same.

(2) Where articles have been registered, a copy of every such resolution or agreement for the time being in force shall be embodied in or annexed to every copy of the articles issued after the passing of the resolution or the making of the agreement.

(3) Where articles have not been registered, a printed copy of every such resolution or agreement shall be forwarded to any member at his request, on payment of one rupee.

(4) This section shall apply to—

- (a) special resolutions ;

(b) resolutions, which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions ;

(c) any resolution of the Board of directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director ;

(d) any agreement relating to the appointment, re-appointment or renewal of the appointment of a managing agent or secretaries and treasurers for a company, or varying the terms of any such agreement, executed by the company ;

(e) resolutions or agreements which have been agreed to by all the members of any class of shareholders but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular manner ; and all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all those members ; and

(f) resolutions requiring a company to be wound up voluntarily passed in pursuance of sub-section (1) of section 484.

(5) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to twenty rupees for every day during which the default continues.

(6) If default is made in complying with sub-section (2) or (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ten rupees for each copy in respect of which default is made.

(7) For the purposes of sub-sections (5) and (6), the liquidator of a company shall be deemed to be an officer of the company.

This section is based on s. 82 of the previous Act and s. 143 of the English Act of 1948. Sub-s. (4) (c) [now (d)] of this section gives effect to the C. L. C.'s recommendation in para 35 of their Report—*Notes on Clauses*.

“Having regard to the importance of managing agents in the working of Joint Stock Companies in this country, we recommend that copies of managing agency agreements or where such agreements are still under consideration at the time of the preparation of the articles of a company, copies of the draft of such agreements

should be printed and affixed to the articles of association before they are registered. When the agreement has been finally executed copies of the agreement should be attached to the articles of association and one copy should be filed with the Registrar of Joint Stock Companies" (C. L. C. R., para 35).

This was originally cl. 184 of the Bill in which some alterations have been made by the Joint Committee with the following observation: "The Joint Committee being of opinion that all agreements relating to the appointment of a managing director must be registered, paragraph (c) of sub-clause (4) makes the necessary provision" (*vide* J. C. R., para 74).

**884. Registrar's powers** :—In registering the alteration of articles under this section the Registrar has a discretion similar to that which he has under s. 33 in registering the memorandum and articles of association. So where a company by altering its articles of association proposes to carry on a business which amounts to a lottery, the Registrar can refuse to register such alteration. It is better to stop it at the threshold rather than to allow it to proceed on the lines and then wind it up as an illegal company after several persons have put their money into the scheme (20).

**193. Minutes of proceedings of general meetings and of Board and other meetings.**—(1) Every company shall cause minutes of all proceedings of general meetings, and of all proceedings at meetings of its Board of directors or of committees of the Board, to be entered in books kept for that purpose.

(2) The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(3) All appointments of officers made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) In the case of a meeting of the Board of directors or of a committee of the Board, the minutes shall also contain—

(a) the names of the directors present at the meeting ; and

(b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring in, the resolution.

(5) Nothing contained in sub-sections (1) to (4) shall be deemed to require the inclusion in any such minutes of any matter which, in the opinion of the chairman of the meeting—

(a) is, or could reasonably be regarded as, defamatory of any person ;

(b) is irrelevant or immaterial to the proceedings ; or

(c) is detrimental to the interests of the company.

**Explanation.**—The chairman shall exercise an absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in this sub-section.

(6) If default is made in complying with the foregoing provisions of this section in respect of any meeting, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

This section is based on s. 83 of the previous Act, s. 145 of the English Act of 1948 and the redraft suggested by the C. L. C. at pages 353 and 354 of their Report —*Notes on Clauses*. Some verbal changes have been made by the Joint Committee in this section.

**884A.** As to the right of inspection under the common law and the right to take copies of the minutes, see *Rameswar v. Calcutta Wheat & Seed Assn.* (21) and notes to regulation 95 of Table A *post*.

**885. Minutes** :—“Directors ought”, as observed by Kekewich J., “to place on record either in formal minutes or otherwise the purport and effect of their deliberations and conclusions; and if they do this insufficiently or inaccurately they cannot reasonably complain of inferences different from those which they allege to be right” (22).

Entries made in a number of loose leaves fastened together in two covers are not admissible in evidence as minutes within the meaning of this section. In such a physical condition at any moment, if any one wishes to do so he can take any number of leaves out and substitute any number of other leaves. It is a thing with which any one disposed to be dishonest can easily tamper. Further, it is not a book within the meaning of the section (23).

It is usual to “confirm” the minutes of the previous board meeting. The word “confirm” sometimes means merely to verify. It is commonly used in that sense at the meetings of public bodies which confirm the minutes of the last meeting, not meaning thereby that they have given them force but merely that they declare them to be accurate (24).

The adoption of the minutes at a subsequent meeting of directors does not make those taking part in such adoption responsible for the acts done at the earlier meeting (25).

After the chairman has signed the minutes, they cannot be altered (26). A minute book purporting to be signed “W. S. Deputy Chairman” was evidence *per se* without proof that W. S. was in fact Deputy Chairman, or as such presided at the meeting (27).

The minutes of a meeting are not the exclusive evidence of what took place at the meeting, and an unrecorded resolution may be proved *aliunde* (28). If the books

(21) [1938] C. 89, 42 C.W.N. 161.

(22) *Liverpool Household Stores Assn.* [1890] 59 L. J. (Ch.) 616, 62 L.T. 873, 875.

(23) *Hearts of Oak Assurance Co. v. Fowler* [1936] 1 Ch. 76.

(24) *Queen v. Mayor of York* [1853] 1 E. & B. 588, 594.

(25) *Burton v. Bevan* [1908] 2 Ch. 240; *Lucas v. Fitzgerald* [1905] 20 T.L.R. 16.

(26) *Cawley & Co.* [1889] 42 Ch. D. 309.

(27) *Sheffield & Co. v. Woodcock* [1841] 7 M. & W. 574.

(28) *Knight's case* [1867] 2 Ch. App. 321; *Fireproof Doors Ltd.* [1916] 2 Ch. 142; *Foster v. Foster* [1916] 1 Ch. 532. See also *Transport Co. v. Tinneveli M. B. Service Co.* [1955] N.U.C. 3186 (Mad.).

of a company show the record of a transaction, e.g., forfeiture of shares, the Court will presume that such a resolution has been passed (29). The minutes are however *prima facie* evidence of what happened at the meeting. Courts will incline more in favour of validity of the proceedings, if facts invalidating the proceedings are not established beyond doubt (30). A case of fraud or overbearing influence is necessary for interference by the Court (31).

The minutes, to be valid, must be made within a reasonable time (32). The directors cannot make any disposition of the minute-book which is inconsistent with the articles (33).

**886. Resolution** :—The articles of association often provide that a letter signed by all the directors shall have the same effect as a resolution of the Board. In the absence of such a provision, the directors cannot act without a meeting (34).

**887. Position, powers and duties etc. of secretary** :—It is usually the duty of the secretary to prepare the minutes of the proceedings of the general as well as the directors' meetings. He may be regarded as a servant of the company (35). It was at one time thought that a master was not liable for the wrong of his servant or agent, if it was not committed for the master's benefit (36); but it has afterwards been held by the House of Lords that the language of Willes J. in *Barwick v. English Joint Stock Bank* (36) has been misunderstood; the true principle is, their Lordships declare, that a principal is liable for the acts of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent (37). "If the agent", as observed by Lord Loreburn L. C., 'commits fraud purporting to act in the course of business such as he was authorized, or held out as authorized to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes J. be looked at instead of one sentence alone, he does not say otherwise' (38). The general rule and the reason therefor were however correctly laid down by Willes J., in the above case: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privy of the master be proved . . . . It is true he has not authorised the particular act but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (39). But where a secretary forged the signature of directors to a cheque which was paid by the bank, the company was held entitled to repudiate the cheque and recover the amount from the bank (40).

(29) *Knights's case* (supra).

(30) *Rebello v. Co operative & Co.* [1924] 26 Bom. L.R. 907.

(31) *Parasuram v. Tata Industrial Bank* [1924] 26 Bom. L.R. 987.

(32) *Toms v. Cinema Trust Co.* [1915] W.N. 29.

(33) *Capital Fire Insurance Assn.* [1883] 24 Ch. D. 408, 414.

(34) *D'Arcy v. Tamar Hill Kit Ry. Co.* [1867] 2 Ex. 15. *Haycraft Gold Reduction Co.* [1900] 2 Ch. 239; but see *Southern C. D. Bank Rider* [1895] 73 I.T. 374 and *Collic's Claim* [1871] 12 Eq. 246, 258.

(35) *Cairney v. Back* [1906] 2 K.B. 746.

(36) *Barwick v. English Joint Stock Bank* [1867] L.R. 2 Ex. 259, 16 I.T. 461.

(37) *Lloyd v. Grace Smith & Co.* [1912] A.C. 716. This has been followed in India in a case in which the author of this book relied upon *Barwick v. Joint Stock Bank* (supra) but was overruled by *Chatterjee & Pearson J.J.*; see *Dinabandhu v. Abdul Latif* [1922] 27 C.W.N. 18; see also *Sherajan v. Alimaddi* [1915] 20 C.W.N. 268.

(38) *Lloyd v. Grace Smith & Co.* (supra) at p. 725.

(39) *Barwick v. English Joint Stock Bank* (supra) at pp. 265, 266.

(40) *Kepitgulla Rubber Estates v. National Bank of India* [1909] 2 K.B. 1010; see also *Ruben v. Great Fingal Consolidated* [1906] A.C. 439.



A statement in the articles of association that a certain person shall be the secretary or other officer of the company will not be treated as a contract (41). Such person should see that the appointment be made by a resolution or by an agreement duly executed after incorporation of the company.

The secretary as a servant of the company is bound to carry out the duties assigned to him, and an agreement between him and the company cannot be read as precluding the latter from appointing a general manager (42). Where the secretary left his employment without reason, he is not entitled to bring a suit for damages (42).

The secretary being a servant of the company is precluded from accepting presents or bonuses from the promoters. If he does so, he will have to account for them (43).

The secretary is the agent of the company through whom the clerical work is done. He must obey the orders of the directors and give effect to their resolutions by issuing notices, sending circulars, writing letters and the like. He will also prepare the agenda for the directors' meetings and general meetings of the company, and usually write up minutes either from his own notes or from those of the chairman of the meeting. He will conduct the ordinary correspondence of the company and answer enquiries or direct clerks to do so (44). But it is no part of his duties to answer enquiries about moneys owing from the company or to make representations on behalf of the company in any matters except those that fall directly within the scope of the company's business (45). If an agent does an act within the scope of his authority, it binds the principal even if the motive was wrongful and the act was done with a view to his private advantage, provided the other party has no knowledge of the wrong (46).

The duty of the secretary includes certifying transfers and receiving and registering notices on behalf of the company. But where the same man is the secretary to two companies, knowledge acquired by him for one company is not notice to the other (47).

A secretary as such has no authority to bind the company by contract or to make representations as to the company's affairs, so as to induce people to take shares (48), or to register a transfer until it is passed by the company's directors (49). He can certify a transfer, but if he does so fraudulently, the company will not be liable (50). If a secretary give untrue answers to inquiries for his own private ends, the company will be liable (51). "A secretary is a mere servant; his position is that he is to do what he is told and no person can assume that he has any authority to make representations binding on the company, nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts" (52).

(41) See *Browne v. La Trinidad* [1887] 37 Ch. D. 1.

(42) *Krishna v. Indo-Union Assurance Co.* [1946] 1 M.L.J. 79.

(43) *McKay's case* [1876] 2 Ch. D. 1.

(44) *Gore-Browne*, 36th ed., p. 357; see also *Palmer's Company Law*, 13th ed., p. 275.

(45) See *Bishop v. Balkis Consolidated Co.* [1890] 25 Q.B.D. 512; *George Whitechurch v. Cavanagh* [1902] A.C. 117.

(46) *Hambro v. Burnand* [1902] 2 K.B. 10; *Bryant v. La Banque du Peuple* [1893] A.C. 170.

(47) *Fenwick, Stobart & Co.* [1902] 1 Ch. 507.

(48) *Barnett, Hoares & Co. v. South London Tramways Co.* [1887] 18 Q.B.D. 815; *Newlands v. National F. A. Assn.* [1885] 53 L.T. 242; *Diwan Chand v. Gujranwalla Sugar Mills Co.* [1937] L. 644.

(49) *Chida Mines v. Anderson* [1905] 22 T.L.R. 27; *Indo-China Steam Navigation Co.* [1917] 2 Ch. 100.

(50) *George Whitechurch v. Cavanagh* (supra).

(51) *British Mutual Banking Co. v. Charnwood Forest Ry. Co.* [1887] 18 Q.B.D. 711.

(52) *Barnett, Hoares & Co. v. South London Tramways Co.* [1887] 18 Q.B.D. 815—per Lord Esher, M.R. at p. 817.

Where over-payment was made by a company to its landlord without making proper deduction on account of income-tax, under a mistake of fact, the company was entitled to recover the sum overpaid notwithstanding the secretary's knowledge of the terms of the lease (53).

A secretary, unless authorized by the Board of directors, cannot convene a general meeting (54), or strike a name off the register of members (55). An act done by the secretary after mentioning the matter to some of the directors, but without any express approval of the directors and without a Board meeting being held to consider the question, will not be considered the act of the directors (56).

A secretary who has in fact acted as a manager is liable for negligence in preparing balance-sheets and accounts whereby he has caused dividend to be paid out of capital (57).

A secretary will be liable for misfeasance if he receives an improper commission (58), but he will not be personally liable for misapplication of the company's funds though he may have been aware of it (59).

The resolution to dismiss a secretary, even if defective for want of proper notice, is a matter within the powers of the company, and the secretary cannot treat it as void (60).

A secretary may be paid out of profits by contract (61).

If the secretary, having plenary power under the articles to enter into a mortgage on behalf of the company, think it advisable to take direct sanction of the directors, but does not disclose to them his interest in the mortgage which he is bound to disclose, he cannot afterwards take shelter in the fact that he could himself have sanctioned the mortgage (62).

**194. Minutes to be evidence.**—Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings took place or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

This section is based on s. 83 (2) of the previous Act and s. 145 (2) of the English Act of 1948—*Notes on Clauses*. See notes to s. 193.

**195. Presumptions to be drawn where minutes duly drawn and signed.**—Where minutes of the proceedings of any general meeting of the company or of any meeting of its Board of directors or of a committee of the Board have been made and signed in accordance with the provisions of sections 193 and 194, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all

(53) *Turvey v. Denton* [1952] 2 A.E.R. 1025.

(54) *State of Wyoming Syndicate* [1901] 2 Ch. 431.

(55) *Wheatcroft's case* [1873] 29 L.T. 324.

(56) *Haycraft Gold Reduction Co.* [1900] 2 Ch. 250; *State of Wyoming syndicate* (supra).

(57) *Municipal Freehold Land Co. v. Pollington* [1890] 63 L.T. 238.

(58) *MacKay's case* [1876] 2 Ch. D. 1.

(59) *Joint Stock Discount Co. v. Brown* [1869] 8 Eq. 381.

(60) *Tanjore Permanent Fund v. Sadasiva* [1926] 50 M.L.J. 479, [1926] M. 705.

(61) *Spanish Prospecting Co.*, [1910] W.N. 241, [1911] 1 Ch. 9.

(62) *Pydah v. Guntur Cotton & C. Mills* [1929] M. 353 [1929] M.W.N. 481, 115 I.C. 486.

proceedings thereat to have duly taken place, and in particular, all appointments of directors or liquidators made at the meeting shall be deemed to be valid.

This section is based on s. 83 (g) of the previous Act and s. 145 (g) of the English Act of 1948—*Notes on Clauses*. See notes to s. 193.

**196. Inspection of minute books of general meetings.**—(1) The books containing the minutes of the proceedings of any general meeting of a company held on or after the 15th day of January, 1937, shall—

(a) be kept at the registered office of the company, and

(b) be open, during business hours, to the inspection of any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting impose, so however that not less than two hours in each day are allowed for inspection.

(2) Any member shall be entitled to be furnished, within seven days after he has made a request in that behalf to the company, with a copy of any minutes referred to in sub-section (1), on payment of six annas for every one hundred words of fractional part thereof required to be copied.

(3) If any inspection required under sub-section (1) is refused, or if any copy required under sub-section (2) is not furnished within the time specified therein, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees in respect of each offence.

(4) In the case of any such refusal or default, the Court may, by order, compel an immediate inspection of the minute books or direct that the copy required shall forthwith be sent to the person requiring it.

This section is based on sub-ss. (4) to (7) of s. 83 of the previous Act and s. 146 of the English Act of 1948. See notes to s. 193.

**197. Publication of reports of proceedings of general meetings.**—(1) No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by section 193 to be contained in the minutes of the proceedings of such meeting.

(2) If any report is circulated or advertised in contravention of sub-section (1), the company, and every officer of the

company who is in default, shall be punishable, in respect of each offence, with fine which may extend to five hundred rupees.

This section is new. It is based on para 79 of the C. L. C. R. and recommendation (ii) at page 252 of the Report—*Notes on Clauses*.

"In view of the fact that general meetings are very sparsely attended, a practice has grown up of circulating the minutes of such meetings to all shareholders. It is, therefore, essential that these meetings should contain a brief but authentic record of all that happens at general meetings so that the absentee shareholders may be in a position to form some reliable idea of what transpired at these meetings. We, therefore, recommend (*vide* item 4 of the Addendum to the annexure) that the provisions of this section should be so amended as to provide explicitly that the minutes of the general meeting should contain a fair summary of the proceedings of such meeting, and in particular of all material questions asked or comments made. We further recommend that such minutes should not be circulated or advertised at the expense of a company, unless they contain the matters mentioned above. It will be necessary for the chairman of the meeting to decide what is a fair summary of its proceedings or what questions asked or comments made would be deemed to be material for the purposes of the meeting, but a statutory obligation to cast the minutes in a particular manner will, we trust, be a useful safeguard against their manipulation by dishonest and unscrupulous persons" (C. L. C. R., para 79).

### *Managerial Remuneration, etc.*

**198. Overall maximum managerial remuneration and minimum managerial remuneration in the absence or inadequacy of profits.**—(1) Save as otherwise expressly provided in this Act, in the case of a public company or a private company which is a subsidiary of a public company, the total remuneration payable by the company to its directors, its managing agent or secretaries and treasurers, if any, and its manager, if any, shall not exceed eleven per cent. of the net profits of the company, computed in the manner laid down in sections, 349, 350 and 351, except that the remuneration of the directors shall not be deducted from the gross profits.

(2) The percentage aforesaid shall be exclusive of any fees payable to directors for meetings of the Board attended by them.

(3) Nothing contained in sub-sections (1) and (2) shall be deemed—

(a) to prohibit the payment of a monthly remuneration to directors in accordance with the provisions of section 309 or to a manager in accordance with the provisions of section 387 ; or

(b) to affect the operation of sections 352, 353, 354, 356, 357, 358, 359 or 360.

(4) Notwithstanding anything contained in sub-sections (1) to (3), if in any financial year, a company has no profits or its profits are inadequate, the company may pay to any director or directors including managing or whole-time directors, if any, its managing agent or secretaries and treasurers, if any, and its manager, if any, or if there are two or more of them holding office in the company, to all of them together, by way of minimum remuneration, such sum not exceeding fifty thousand rupees per annum as it considers reasonable :

Provided that where a monthly payment is being made or is proposed to be made to any managing or whole-time director or directors and the manager or to any one or more of them and the Central Government is satisfied that for the efficient conduct of the business of the company, the minimum remuneration of fifty thousand rupees per annum is or will be insufficient, the Central Government may, by order, sanction an increase in the minimum remuneration to such sum, for such period, and subject to such conditions, if any, as may be specified in the order.

Sections 198 to 204 are new and have been inserted by the Joint Committee with the following observations:—“The Committee consider that there should be an overall maximum for the managerial remuneration payable to the directors, managing agent, Secretaries and Treasurers and managers. The limit has been fixed at 11 per cent. of the net profits, inclusive of any monthly payments made by way of remuneration but exclusive of fees payable to directors for attending the meetings of the Board of directors. It has been made clear that the operation of clauses 351 (now 352) to 354 and 356 to 360 will not be affected by the provisions contained in this clause.

“The Committee also consider that if in any financial year a company earns no profit or the profits are inadequate, it may pay to any director including a managing or whole time director, its managing agent or Secretaries and Treasurers, if any, and its manager, if any, or if there are two or more of them holding office in the company, to all of them together, a minimum remuneration not exceeding fifty thousand rupees per annum. New sub-clause (4) makes the necessary provision” (*vide* J. C. R., para 75).

The Proviso to sub-s. (4) has been inserted by the Lok Sabha.

**199. Calculation of commission etc., in certain cases.—**(1) Where any commission or other remuneration payable to any officer or employee of a company (not being a director, the managing agent, secretaries and treasurers or a manager) is fixed at a percentage of, or is otherwise based on, the net profits of the company, such profits shall be calculated in the manner set out in sections 349, 350 and 351.

(2) Any provision in force at the commencement of this Act for the payment of any commission or other remuneration in any manner based on the net profits of a company, shall continue to be in force for a period of "one year" from such commencement; and thereafter shall become subject to the provisions of sub-section (1).

This section is new and has been inserted by the Joint Committee with the following observations: "This reproduces original clause 296 of the Bill with some changes. It is considered that this provision is more appropriately placed in 'Chapter I—General Provisions' than in 'Chapter II—Directors,' as it applies not only to directors but also to other officers and employees of the company.

"A special provision having been made for the calculation of the commission in the case of the manager, the clause has been made inapplicable to him also" (*vide* J. C. R., para 76).

This section gives effect to the recommendation (iv) in para 146 of the C. L. C. R. See also sub-cl. (3) and (4) at page 374 of their redraft—*Notes on Clauses*.

See notes to the last section.

In sub-s. (2) of this section the period has been reduced to one year from two years by the Rajya Sabha.

**200. Prohibition of tax-free payments.—**(1) No company shall pay to any officer or employee thereof, whether in his capacity as such or otherwise, remuneration free of any tax, or otherwise calculated by reference to, or varying with, any tax payable by him, or the rate or standard rate of any such tax, or the amount thereof.

*Explanation.*—In this sub-section, the expression "tax" comprises any kind of income-tax including super-tax.

(2) Where by virtue of any provision in force immediately before the commencement of this Act, whether contained in the company's articles, or in any contract made with the company, or in any resolution passed by the company in general meeting or by the company's Board of directors, any officer or employee of the company holding any office at the commencement of this Act is entitled to remuneration in any of the modes prohibited by sub-section (1), such provision shall have effect during the residue of the term for which he is entitled to hold such office at such commencement, as if it provided: instead for the payment of a gross sum subject to the tax in question, which, after deducting such tax, would yield the net sum actually specified in such provision.

- (3) This section shall not apply to any remuneration—  
 (a) which fell due before the commencement of this Act, or  
 (b) which may fall due after the commencement of this Act, in respect of any period before such commencement.

This section is new and has been inserted by the Joint Committee with the following remark: "This reproduces original clause 299 of the Bill. Being also a general provision, it has also been removed from Chapter II to Chapter I" (*vide* J. C. R., para 77).

This section is based on para 88 of the C. L. C. R. and s. 189 of the English Act of 1948. It has been made clear that the intention underlying this section is that the actual amount paid should be made known, to the shareholders and other persons concerned—*Notes on Clauses*.

"We recommend that no remuneration payable by the company to any officer, employee or servant of the company, should be tax-free. As the Cohen Committee pointed out, the principal objection to the practice of making tax-free payment is that it creates a class of persons who are immune from any future increase in taxation. Further, this practice has the effect of making it difficult for shareholders to assess the burden imposed on a company by its salaries and wages bill" (para 88 of the C. L. C. R.).

See notes to s. 198.

**201. Avoidance of provisions relieving liability of officers and auditors of company.**—(1) Save as provided in this section, any provision, whether contained in the articles of a company or in an agreement with a company or in any other instrument, for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against, any liability which, by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void :

Provided that a company may, in pursuance of any such provision as aforesaid, indemnify any such officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or discharged or in connection with any application under section 633 in which relief is granted to him by the Court.

(2) Nothing contained in the proviso to sub-section (1) shall apply to the constituted attorney of the managing agent of a company, unless such attorney is, or is deemed to be, an officer of the company.

This section has been inserted by the Joint Committee with the following remark: "This clause reproduces original clause 304 of the Bill. Being a general provision, it has had also to be put in Chapter I instead of in Chapter II. Clause (a) of the proviso to sub-clause (1) has been omitted as being unnecessary, and a consequential change has been made in sub-clause (2)" (*vide* J. C. R., para 78).

"This section is based on s. 86C of the previous Act and s. 205 of the English Act of 1948. The recommendation of the C. L. C. at page 258 of their Report have been incorporated"—*Notes on Clauses*

See notes to s. 198.

**887A. Indemnity** :—Where the articles provide for indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or default on their part, in order to be guilty of wilful negligence the director must not only be guilty of, but he must know that he is committing, a breach of duty or is recklessly careless in the matter. A director is justified in trusting the integrity, skill and competence of the officials unless he has grounds of suspicion. Insolvency of an official does not necessarily mean that he is dishonest (63).

### *Prevention of Management by Undesirable Persons*

**202. Undischarged insolvent not to manage companies.**—(1) If any person, being an undischarged insolvent,—

(a) discharges any of functions of a director, or acts as or discharges any of the functions of the managing agent, secretaries and treasurers, or manager, of any company ; or

(b) directly or indirectly takes part or is concerned in the promotion, formation or management of any company ; he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(2) In this section, "company" includes—

(a) an unregistered company ; and

(b) a body corporate incorporated outside India, which has an established place of business within India.

This section is new and has been inserted by the Joint Committee with the following remark: SS. 202 and 203 "reproduce original clauses 297 and 298 of Chapter II. Being general provisions, applicable to others besides directors, they have also been put in Chapter I.

"In new clause 201 (now s. 202) the reference to an undischarged insolvent functioning as a director etc. with the leave of the Court has been omitted, as such insolvent cannot act as a director at all. Sub-clause (2) which provides the procedure for applications for grant of leave by the Court has also had to be omitted, as a consequential change" (*vide* J. C. R., para 79).

(63) *Doss v. Connell* [1937] M. 124. See also *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407 (434).



This section is based on s. 187 of the English Act of 1948. It has been made clear already that an undischarged insolvent cannot become director; but he may discharge the functions of a director without being termed as such. This section is intended to prohibit this and also to prevent an undischarged insolvent from being appointed as managing director or manager of the company—*Notes on Clauses*.

See notes to s. 198.

### **203. Power to restrain fraudulent persons from managing companies.—(1) Where—**

(a) a person is convicted of any offence in connection with the promotion, formation or management of a company; or

(b) in the course of winding up a company it appears that a person—

(i) has been guilty of any offence for which he is punishable (whether he has been convicted or not) under section 542; or

(ii) has otherwise been guilty, while an officer of the company, of any fraud or misfeasance in relation to the company or of any breach of his duty to the company;

the Court may make an order that that person shall not, without the leave of the Court, be a director of, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for such period not exceeding five years as may be specified in the order.

(2) In sub-section (1), the expression “the Court”,—

(a) in relation to the making of an order against any person by virtue of clause (a) thereof, includes the Court by which he is convicted, as well as any Court having jurisdiction to wind up the company as respects which the offence was committed; and

(b) in relation to the granting of leave, means any Court having jurisdiction to wind up the company as respects which leave is sought.

(3) A person intending to apply for the making of an order under this section by the Court having jurisdiction to wind up a company shall give not less than ten days' notice of his intention to the person against whom the order is sought, and at the hearing of the application, the last-mentioned person may appear and himself give evidence or call witnesses,

(4) An application for the making of an order under this section by the Court having jurisdiction to wind up a company may be made by the Official Liquidator, or by the liquidator of the company, or by any person who is or has been a member or creditor of the company.

(5) On the hearing of any application for an order under this section by the Official Liquidator or the liquidator, or of any application for leave under this section by a person against whom an order has been made on the application of the Official Liquidator or liquidator, the Official Liquidator or liquidator shall appear and call the attention of the Court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.

(6) An order may be made by virtue of sub-clause (ii) of clause (b) of sub-section (1), notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made, and for the purposes of the said sub-clause (ii), the expression "officer" shall include any person in accordance with whose directions or instructions the Board of directors of the company has been accustomed to act.

(7) If any person acts in contravention of an order made under this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(8) The provisions of this section shall be in addition to, and without prejudice to the operation of, any other provision contained in this Act.

This section is new. It is based on s. 188 of the English Act of 1948, and para 94 of the C. L. C. R.—*Notes on Clauses*.

"The effect of this section is that a person guilty of an offence mentioned in it may be disqualified for a maximum period of five years from being concerned with or taking part in the management of a company without the leave of the court, having jurisdiction to wind it up. This disqualification may be imposed by any court before whom a person is *convicted* of any offence in connection with the promotion, formation or management of a company or by any court in course of winding up of a company, if it appears to it that the person has carried on the business of a company with the intention to defraud creditors or for any fraudulent purpose or has been otherwise guilty of any fraud in relation to the company or has otherwise been guilty while an officer of the company of any breach of his duty to the company whether he has been *convicted of any offence or not*" (para 94 of the C. L. C. R.).

See notes to ss. 198 and 202. The Joint Committee observes: In the new clause 202 (now s. 203), sub-clause (8) is an addition made by the Joint Committee as a measure of caution (*vide* J. C. R., para 79).

*Restriction on appointment of firms and bodies corporate to offices*

**204. Restriction on appointment of firm or body corporate to office or place of profit under a company.—**

(1) Save as provided in sub-section (2), no company shall, after the commencement of this Act, appoint or employ any firm or body corporate to or in any office or place of profit under the company, other than the office of managing agent or secretaries and treasurers, for a term exceeding five years at a time.

(2) Sub-section (1) shall not apply to the appointment or employment of a firm or body corporate as a technician or a consultant,—

(i) unless the firm or body corporate aforesaid is already the managing agent or secretaries and treasurers of the company ; or

(ii) unless a partner in the firm aforesaid, or a director or member of the body corporate aforesaid being a private company, or a director of the body corporate aforesaid not being a private company, is—

already the managing agent of the company ;

or a member of the firm, a director or member of the private company, or a director of the body corporate not being a private company, which firm, private company or body corporate is already the managing agent or the secretaries and treasurers of the company.

(3) Any firm or body corporate holding at the commencement of this Act any office or place of profit under the company shall, unless its term of office expires earlier, be deemed to have vacated its office immediately on the expiry of five years from the commencement of this Act.

(4) Nothing contained in sub-section (1) shall be deemed to prohibit the re-appointment, re-employment, or extension of the term of office, of any firm or body corporate by further periods not exceeding five years on each occasion :

Provided that any such re-appointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force.

(5) Any office or place in a company shall be deemed to be an office or place of profit under the company, within the meaning of this section, if the person holding it obtains

anything by way of remuneration, whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise.

(6) This section shall not apply to a private company, unless it is a subsidiary of a public company.

See notes to s. 198.

Sub-s. (2) of this section has been altered by the Lok Sabha by substituting the new cl. (ii) for the original cls. (ii) to (iv), by altering the Proviso to sub-s. (4) and by substituting the new sub-s. (5) for the original sub-s. (5).

### *Dividends and manner and time of payment thereof*

**205. Dividend to be paid only out of profits.**—No dividend shall be declared or paid except out of the profits of the company or out of moneys provided by the Central or a State Government for the payment of the dividend in pursuance of a guarantee given by such Government.

*Explanation.*—Nothing in this section shall be deemed to affect in any manner the operation of section 208.

SS 205, 206 and 207 are based on the C. L. C.'s recommendation at page 341 of their Report under reg. 97 of Table A of the previous Act—*Notes on Clauses*.

S. 205 provides for the payment of the dividend only out of profits present or past—*ibid.*

This was originally cl. 190 of the Bill in which alterations have been made by the Joint Committee with the following observation: "It has been made clear, *ex abundanti cautela*, that a company may pay dividends not only out of profits but also out of moneys provided by the Central or a State Government for the payment of dividend, in pursuance of a guarantee given by such Government" (*vide J. C. R.*, para 80).

This section is based on Reg. 97 of Table A of the previous Act and Reg. 116 of Table A of the English Act of 1948

**888. Meaning of the section** :—“The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which if sold would produce it and this is more than is required by law (64). Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost and yet the excess of current payments may be divided (65), but that the floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess in which case to divide such excess without deducting the capital which forms part of it will be contrary to law” (66). There is no rule of law that profit of one year's trading could not be divided

(64) *National Bank of Wales* [1899] 2 Ch 629; *Ammonia Soda Co. v. Chamberlain* [1918] 1 Ch. 266; *Lawrence v. West Somerset Ry. Co.* [1918] 2 Ch. 250; *Lee v. Neuchatel Co.* [1889] 41 Ch. D. 1; *Wilmer v. Macnamara* [1895] 2 Ch. 245; *Kingston Cotton Mills* [1896] 1 Ch. 331, 348.

(65) *Re Jowitt* [1922] 2 Ch. 442.

(66) *Verner v. General Investment Trust* [1894] 2 Ch. 239, at p. 266 per Lindley L. J.

merely because on the profit and loss account there was a debit balance on the trading of former year (67).

The statutes do not expressly prohibit payment of dividends out of capital, but their provisions are wholly inconsistent with return of capital to shareholder" (66). Dividends must not be paid out of capital (68), i.e., under the guise of paying dividends the company must not return any part of the subscribed capital to the members (69).

**688A. Distinction between the two expressions** :—"The two propositions (1) that dividends must not be paid out of capital, and (2) that dividends may be paid out of profits are not identical but diverse. The first is the requirement of the statutes and cannot be dispensed with; the latter is in Table A or the articles of the particular company and is one of the regulations of the company which has to be construed. A company which has a balance to the credit of its profit and loss accounts is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and if the assets subsequently increase in value the amount neither has been, nor will be, part of the capital. If therefore a part of that balance is used in paying a dividend that dividend is not paid out of capital, because the same has never become capital, although it still remains a question whether it has been paid out of profits or not. It has been pointed out by Lindley L. J. in *Lee v. Neuchatel Asphalte Co.* (70) that there is nothing in the statute requiring a company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative that dividend shall not be paid out of capital, and the balance to the credit of profit and loss account does not automatically become part of the capital assets, because the value of the actual capital assets has depreciated to an amount equal to or exceeding that balance" (71). "The real question for determination therefore is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses. There is no single definition of the word 'profits' which will fit all all cases. Take for instance Professor Marshall's definition (72). 'When a man is engaged in business his "profits" for the year are the excess of his receipts from his business during the year over his outlay for his business; the difference between the value of his stock and plant at the end and at the beginning of the year being taken as part of his receipts or as part of his outlay according as there has been an increase or decrease in value.' I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition 'stock and plant' obviously include both fixed and circulating capital as defined at p. 134 of the same treatise, as for instance the judgment of Lindley L. J. in *Verner v. General & Commercial Investment Trust* (73), where he says 'Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up.' I do not understand his lordship to be laying down a general and

(67) *Crichton's Oil Co.* [1901] 2 Ch. 184, [1902] 2 Ch. 86.

(68) *Mc Dougall v. Jersey Imperial Hotel Co.* [1865] 2 H. & M. 528; *National Funds Assurance Co.* [1878] 10 Ch. D. 118, 127; *Holmes v. Newcastle Abattoir Co.* [1875] 1 Ch. D. 682; *Stroud v. Royal Aquarium Society* [1903] 89 L.T. 243; *re Sharp* [1892] 1 Ch. 154.

(69) *Ammonia Soda Co. v. Chamberlain* (supra).

(70) [1889] 41 Ch. D. 1, 22.

(71) *Per Farwell J.* in *Bond v. Barrow H. Steel Co.* [1902] 1 Ch. 353 at p. 365.

(72) *Principles of Economics* Vol. 1, p. 142.

(73) [1894] 2 Ch. 239, 266.

universal rule that in every company fixed capital may be sunk and lost, that there are companies in which that may be the case. All the authorities however agree, I think, that circulating capital must be kept up" (74).

**888B. Meaning of "Profits"** :—"Profits" means something after payment of the expenses. The word means net profits (75). Lord Justice Fletcher-Moulton explained the meaning of the word "profits" in a later case (76). "Profits" implies a comparison between the state of business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can be ascertained by a comparison of the assets of the business at the two dates" (77).

"If the total assets of the business at the two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question" (78).

In the same case Lord Justice Farwell observed : "Money which has in fact resulted from the profits made in trading is none the less profit because it is carried over to a suspense account or reserve fund: if it is lost in the trading of subsequent years, there is an end of it; but so long as it remains in *status quo*, it remains as undistributed profits; see Lindley L. J. in *Bridgewater Navigation Co.* [1891] 2 Ch. 317" (79).

Profit does not necessarily mean any amount actually netted. It only means that, that is the amount by which the credit side exceeds the debit side in the accounts as appearing in the company's books. Till an account is finally settled this sort of profit may be merely on paper. Until a business is actually wound up any statement as to profits is partly fact and partly an estimate. In most cases it is impossible to attain exactitude in ascertaining the profits of a business because such profits are naturally dependent upon the valuation of the assets of the concern. The proper ascertainment of profits in the case of a company is of great importance only in order to avoid the possibility of payment of dividend wholly or partly out of capital which is strictly forbidden. If that is guarded against and there is no idea of declaring a dividend, showing of profit on paper may not be so vitally mistaking the position of the company after all (80).

**888C. What are net profits** :—"Net profits" of the business for a year is the excess of the receipts for the year over the current expenses and outgoings of the same year, *i.e.*, the fund which for that year is capable of being lawfully applied by the company to the payment of dividend. As a matter of law that fund could only be arrived at after deducting the excess profits duty which is a debt of the company to the Government (81).

"So long as such a company", observe their Lordships of the Judicial Committee, "is a going concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividend to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account. The balance to the credit of profit and loss account may in many cases be divided as dividend even if

(74) *Bond v. Barrow H. Steel Co.* (supra) at pp. 365, 366.

(75) *Davison v. Gillies* [1879] 16 Ch. D. 347n (348n).

(76) *Spanish Prospecting Co.* [1911] 1 Ch. 92.

(77) *Ibid* p. 98.

(78) Per Fletcher-Moulton L. J. in the "previous case at p. 99.

(79) *Ibid* at p. 106.

(80) *Karachi Bank v. Shewaram* [1933] S. 12, 33 Cr. L.J. 891, 140 L.C. 31.

(81) *Patent Castings Syndicate v. Etherington* [1919] 2 Ch. 254.

the company's capital account is in debit and such a distribution by way of dividend would *prima facie* be 'income or profits' of the trust share and belong to the tenant for life" (82).

**888D. Ambiguous** :—"Dividends presuppose profits of some sort and this is unquestionably true. But the word 'profit' is by no means free from ambiguity" (83). The question of what is profit available for dividends depends upon the result of the whole account fairly taken for the year, capital as well as profit and loss, and though dividends may be paid out of earned profits in proper cases notwithstanding a depreciation of capital, a realized accretion to the estimated value of one item of capital assets cannot be deemed to be profit divisible amongst the shareholders without reference to the whole accounts fairly taken (84). But where sufficient assets would be left to answer the paid up capital a realized profit on capital assets can be divided unless forbidden by the articles (85).

"It is clear I think that an appreciation in total value of the capital assets, if duly realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend" (86)

**888E. House of Lords reserved their opinion** :—Although the question of the payment of dividend out of capital was discussed by the Court of Appeal in the case of the *National Bank of Wales* (87), the House of Lords reserved their opinion on this important question (88). Lord Halsbury said: "What are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve" (89).

In the same case (90) Lord Macnaghten gave the following warning. "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs" (91).

**888F. Previous decisions** :—But the observations of their Lordships in *Dovey v. Cory* (88) cannot be considered as having overruled or qualified (92) the previous decisions of the Court of Appeal in the cases noted below (93).

**Dividend may be paid out of current profits** :—An ordinary trading company may lawfully pay a dividend out of current profits without setting aside a sum sufficient to cover depreciation in the value of the fixed capital (94). "It is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid up capital is intact" (95).

Lord Justice Kay held : "Any income received may be divided, whether part of the capital is lost or not. At present I do not know of any law to prevent this, and it might be difficult to provide such a law without unduly interfering with the liberty of commercial proceedings" (96).

(82) *Hill v. Parmanent Trustee Co.* [1930] P. C. 302 (305), [1930] A.L.J. 1347.

(83) *Per Lindley L. J.* in *Verner v. General Investment Trust*, *infra* at p. 266.

(84) *Foster v. New Trinidad & Co.* [1901] 1 Ch. 208.

(85) *Cross v. Imperial C. G. Assn.* [1923] 2 Ch. 558.

(86) *Foster v. New Trinidad & Co. Co.* (*supra*) *per Byrne J.* at p. 212.

(87) [1899] 2 Ch. 629.

(88) *Dovey v. Cory* [1901] A.C. 477.

(89) *Ibid* p. 487.

(90) *Dovey v. Cory* (*supra*).

(91) *Ibid* p. 488.

(92) *Ammonia Soda Co. v. Chamberlain* [1918] 1 Ch. 266, (C.A.).

(93) *Lee v. Neuchatel Asphalt Co.* (*infra*); *Verner v. General Trust Co.* (*infra*) and *National Bank of Wales* [1899] 2 Ch. 629.

(94) *Kingston Cotton Mills* [1896] 1 Ch. 331.

(95) *Per Lindley L. J.* in *National Bank of Wales* (*supra*).

(96) *Verner v. General Investment Trust* [1894] 2 Ch. 239 at p. 270.

The Companies Act does not, nor does the general law, prohibit a company from distributing the clear net profits of its trading in any year unless its paid up capital is intact or until it has first made good all trading losses incurred in previous years (97).

Again Lord Justice Lindley observed : "There is no law which compels limited companies in all cases to recoup losses shown by the capital account out of the receipts shown in the profit and loss account, although care must be taken not to treat capital as if it were profit" (98). Directors are not bound to set aside a portion of the profits as a sinking fund (99), but it is safe for them to make some provision for making good the loss of fixed capital before paying away profits as dividend (1).

If there is a reserve fund, also an interest adjustment account or suspense account, sufficient to cover the bad and doubtful debts, a company would be justified in declaring a dividend out of profits ; and under such circumstances the company would be justified in carrying to profit and loss account interest on bad and doubtful debts not actually realized (2).

**888G. Meaning of "capital" :—**Moreover when it is said and said truly that dividends are not to be paid out of capital, the word 'capital' means the money subscribed pursuant to the memorandum of association or what is represented by the money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock v. British Bank of South America* [1892] 2 Ch. 199" (3). As to the distinction between the fixed capital and circulating capital see notes to s. 13.

**888H. Income v. corpus :—**Moneys paid in respect of shares in a limited company may be income or corpus of a settled share according to the procedure adopted, i.e., according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up. Each process might appear to involve some injustice, the former to the remainder man the latter to the tenant for life (4).

**889. Each case depends upon its circumstances :—**The question whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses (5). Although in some cases fixed capital may be sunk and lost without precluding a payment of dividend, circulating capital must be kept up (5).

**890. Profits may be carried to suspense account or reserve fund :—**"A company which has a balance to the credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to suspense account or to reserve, and if the assets subsequently increase in value, the amount neither has been nor will be part of the capital. If, therefore, a part of that balance is used in paying a dividend, that dividend is not paid out of capital, because the sum has never become capital although it still remains a question whether it has been paid out of profits or not (6).

(97) *Ammonia Soda Co. v. Chamberlain* (supra).

(98) *Verner v. General Investment Trust* (supra) at p. 267.

(99) *Verner v. General Investment Trust* (supra) ; *Lee v. Neuchatel Asphalt Co.* [1889] 41 Ch. D. 1.

(1) *Bond v. Barrow H. Steel Co.* [1902] 1 Ch. 353.

(2) *Karachi Bank v. Shewaram* [1933] S. 12, 33 Cr. L.J. 891, 140 I.C. 31 following *Cliford v. Emp.* [1914] 15 Cr. L.J. 80, 22 I.C. 432 (F.B.).

(3) *Verner v. General I. Trust* (supra) at p. 265.

(4) *Hill v. Permanent Trustee Co.* [1930] P.C. 302, (305) [1930] A.L.J. 1447.

(5) *Verner v. General Investment Trust*, supra.

(6) Per Farwell J. in *Bond v. Barrow H. Steel Co.* (supra) at p. 365.



In the undernoted case where the directors of a company owning and operating steam trawlers sold some of their vessels for sums largely exceeding the value at which they stood in the balance sheet, carried the proceeds to suspense account and distributed them as cash bonuses to the shareholders, it was held that not having been capitalized by the issue of bonus shares increasing the total capital, the payments were income (7).

**891. Keeping assets up to nominal capital is not necessary** :—This subject was first elaborately discussed by eminent Judges in *Lee v. Neuchatel Asphalte Co.* (8), where it was held that a company was under no obligation to keep the value of its assets up to the nominal amount of its capital, and the payment of a dividend was not to be considered a return of capital merely on the ground that no provision had been made for keeping the assets up to the nominal amount of capital.

**892. Case of "wasting property"** :—There is nothing in the Companies Act to prohibit a company formed to work a wasting property as, e.g., a mine or a patent, from distributing as dividend the excess of the proceeds of working above the expenses of working, nor to impose on the company any obligation to set apart a sinking fund to meet the depreciation in the value of the wasting property. If the expenses of working exceed the receipts, the accounts must not be made out so as to show an apparent profit and so enable the company to pay a dividend out of capital, but the division of the profits without providing a sinking fund is not such a payment of dividends out of capital as is forbidden by law (9).

"If a company is formed to acquire and work a property of a wasting nature, for example a mine, a quarry or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money, obtained by working the property over the cost of working it, from being divided amongst the shareholders and this in my opinion is true although some portion of the property itself is sold, and in some sense the capital is thereby diminished" (10).

"There is nothing in the Act which says that dividends are only to be paid out of profits. There is a provision to that effect in Table A, and that rather favours the view that the matter of how profits are to be divided and dealt with, and out of what fund dividends are to be declared is a matter of internal regulation" (11).

**893. Payment of dividend, not object** :—"But still there is this firmly fixed that capital assets of the company are not to be applied for any purpose not within the objects of the company and paying dividend is not the object of the company, the carrying on the business of the company is its object" (12).

**894. When capital is lost** :—"Having stated shortly what are the provisions of the Act of Parliament relating to this matter, I may safely say that the Companies Acts do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound up, and I think this omission is quite reasonable. The capital may be lost, yet the company may be a very thriving concern" (13).

(7) *Mountain v. Bates* [1928] Ch. 682.

(8) [1889] 41 Ch. D. 1.

(9) [1889] 41 Ch. D. 1.

(10) Per Lindley L. J. in *Lee v. Neuchatel Asphalte Co.* [1889] 41 Ch. D. 1 at p. 24.

(11) Per Cotton L. J. *ibid* at p. 17. But this has, since 1937, become part of the Act.

(12) *Ibid* at p. 17; see the observations of Chitty J. in *Guinness v. Land Corp'n. of Ireland* [1883] 22 Ch. D. 349.

(13) *Lee v. Neuchatel Asphalte Co.* (supra) at p. 22 per Lindley L. J.

**895. Company is not debtor to capital** :—"The notion that a company is debtor to capital, although it is a convenient notion it does not deceive men; is apt to lead one astray. The company is not a debtor to capital, the capital is not a debt of the company" (14). "The amount credited," observe their Lordships of the Judicial Committee, "upon a share may, as between one shareholder and another, while the company is a going concern, determine the proportion of profits receivable by him as dividend, and in a winding up, his proportion of surplus assets, but it has no influence to extend or increase the aggregate amount available for division in due course of administration amongst the whole body of shareholders nor does it make the company a debtor for any sum at all" (15).

**896. Expenditure chargeable to revenue or capital** :—"It is not open to doubt that under ordinary circumstances where a trader in order to effect a saving in his working expenses dispenses with the services of a particular agent or servant, and makes payment for the cancellation of the agency or service agreement, such a payment is properly chargeable to revenue; it does not involve any addition to or withdrawal from fixed capital; it is purely a working expense" (16).

"The broad principle applicable to a case like the present is stated by Viscount Cave, L. C., in *British Insulated &c. Cables v. Atherton* (17). But when an expenditure is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital" (18).

"It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made 'with a view' to bringing an asset or advantage which is to be for the 'enduring' benefit of the trade. I agree with Rowlatt J that by 'enduring' is meant 'enduring in the way that fixed capital endures'. An expenditure on acquiring floating capital is not made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in *Mallet v. Stavelay Coal & Iron Co.* (19)" (20).

**897. What is within shareholders' discretion** :—"The Act does not say what expenses are to be charged to capital and what to revenue. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on those matters. If they do, the regulations must be observed: if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat creditors" (21).

**898. Warning of Lord Justice Lindley** :—"The following warning of Lord Justice Lindley should always be borne in mind: "You must not have fictitious accounts. If your earnings are less than your current expenses, you must not cook

(14) *Ibid* p. 23; *Verner v. General L. Trust* [1894] 2 Ch. 239; *Trustees' Corp'n. v. Commissioners of Income Tax* [1930] P.C. 151, 54 Bom. 437, 34 C.W.N. 709, 57 I.A. 154, 51 C.L.J. 589, 32 Bom. L.R. 820, 123 I.C. 177.

(15) *Trustees' Corp'n. v. Commissioners of Income Tax* [1930] P.C. 151 at pp. 157-58.

(16) *Anglo-Persian Oil Co. v. Dale* [1932] 1 K.B. 124, per Lawrence L. J. at pp. 139-40.

(17) [1926] A.C. 205, 213.

(18) *Anglo-Persian Oil Co. v. Dale* [supra] at p. 142.

(19) [1928] 2 K.B. 405.

(20) *Anglo-Persian Oil Co. v. Dale* (supra) per Romer L. J. at p. 146.

(21) *Lee v. Neuchatel Asphalte Co.* [1889] 41 Ch. D. 1 at p. 25.

your account, so as to make it appear that you are earning a profit and you must not lay your hands on your capital to pay dividend. But it is I think a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any sense as is forbidden by the Act" (21).

**899. Depreciation** :--Depreciation of capital assets such as building and fixed plant must be taken into account before arriving at the profits of the year; so if the articles declare that dividend shall only be payable out of the profits, no dividend can be declared until such depreciation has been allowed (22).

Of course "a company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished or a company may contract with its creditors to keep its capital or assets up to a given value" (23).

**900. Single item of gain** :--Apart from a special provision in the articles, a single item of gain by redemption of debenture stock cannot be dissociated from the loss of capital assets, and the amount of the discount is not distributable as dividend (24). If an amount does not arise out of the company's business, it is not distributable in dividend (24). Where the issue of loan capital was not one of the objects or part of the business of the company, but was a power to be exercised incidentally to or in furtherance of, its objects, the discount was not divisible as net profit as it did not arise out of the company's business (25).

**901. Dictum of Cotton, L. J.** :--"If the Court sees that the directors of the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, and then in what is really a matter of internal arrangement (if it is done honestly and does not violate any of the provisions of the articles) the Court is very unwilling to interfere, and in my opinion ought not to interfere, with the discretion exercised by the directors, who have the management of the company, or with the powers exercised by the company within the articles" (26). The Court will not interfere with the directors as regards the manner in which profits are ascertained (27).

**902. Recoupment** :--Where a company has paid for things, properly chargeable to capital, out of revenue, it can recoup the revenue account at a subsequent time out of capital and may, if necessary, raise fresh capital for the purpose under their borrowing powers (28). Payment of dividend out of the so-called debenture capital is not illegal (29) as it is no capital at all but money raised by borrowing (30); and for this purpose it is permissible to revalue the assets (31). Where depreciation in investment has been debited to revenue account, the investment rising in value, the appreciation may be credited to revenue (32). But earnings after the commencement of winding up are capital and not income (32). A company which applies its profits in writing off a corresponding amount of the value of the goodwill instead of carrying them to a goodwill depreciation reserve fund, but which has not

(22) *Dent v. London Tramways Co.* [1880] 16 Ch. D. 344.

(23) *Verner v. General Investment Trust* [1894] 2 Ch. 299 at p. 265 per Lindley L. J.

(24) *Wall v. London & Provincial Trust* [1920] 2 Ch. 582.

(25) *Wall v. London & Provincial Trust* (supra).

(26) Per Cotton L. J. in *Lee v. Neuchatel Asphalte Co.* (supra) at p. 18.

(27) *Lambert v. Neuchatel Asphalte Co.* [1882] 52 L.J. Ch. 882; *Stevens v. South Devon Ry. Co.* [1851] 9 Ha. 313.

(28) *Mills v. Northern Ry.* [1870] 5 Ch. App. 621, 631; see also *Jamaica Ry. Co. v. A. G. of Jamaica* [1893] A.C. 127, 136.

(29) *Bloxam v. Metropolitan Ry.* [1868] 3 App. 337.

(30) *Bloxam v. Metropolitan Ry.* [1868] 3 Ch. App. 337, 350.

(31) See *Ammonia Soda Co. v. Chamberlain* [1918] 1 Ch. 266.

(32) *Bishop v. Smyrna & Cassaba Ry. Co.* [1895] 2 Ch. 596.

finally and unreservedly capitalized these profits, may write back to profit account so much of the depreciation written off goodwill as proves to be in excess of the proper requirement (33).

**903. Sale of capital assets** :—If there has been a sale of capital assets with the result that the assets including the purchase money exceed the aggregate amount of the paid up capital and the company's liability to outside creditors, the company can treat the excess as profit and distribute it in dividend although it has been called "capital reserve fund" (34).

**904. Dividend may be paid out of estimated as opposed to realized profits** :—Dividends may be paid out of estimated profits, although not actually realized (35), unless articles provided that dividends should only be paid out of realized profits (36). "Realized profits" must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purpose of division" (36). Directors who treat estimated profits as realized and in fact pay dividend out of capital on the chance that sufficient profits might be made, will however be jointly and severally liable, as upon breach of trust (36). But where debts owing to a company were under-estimated for motives of prudence, the difference between the estimated and ascertained value, when known, represents undrawn profits (37).

**905. Payment out of premium** :—Premiums obtained on the issue of shares were regarded as profits (38). There was no principle of law which prevented a company from paying dividends out of assets representing premium on the issue of shares (39). But see now s. 78.

**906. Director's liability** :—In order to charge directors for dividends paid out of capital it is not necessary to establish fraud (40). But if there is no fraud and the directors acted in the honest belief that there were profits, when in fact there were none, they will not be liable even if the payment of dividend is *ultra vires* (41). If dividend is declared without proper investigation of the financial position of the company and no profit and loss account is prepared, but only account of receipts and payments, making no allowance for risks, the directors will be liable if they fail to show that the dividend was properly declared (42).

It is settled by authorities that (1) directors are *quasi* trustees of the company's capital; (2) that directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up; (3) that the acquiescence of the shareholders does not affect the creditors in such a case; and (4) that such an act is a breach of trust and the remedy is not barred by the Statute of Limitation (43). But in this connection the observations of Lindley, M. R. should be borne in mind: "It was stated in the judgment of this Court in *Lagunas Nitrate Co. v. Langunas Syndicate* (44), that if directors act within their powers—if they act

(33) *Stapley v. Read Brothers Ltd* [1942] 2 Ch. 1.

(34) *Lubbock v. British Bank of South America* [1892] 2 Ch. 198; in this case the principles of keeping accounts were discussed.

(35) *City of Glasgow Bank v. Mackinnon* [1882] 9 Rettic. Court of Sess. 555.

(36) *Oxford Building Society* [1887] 35 Ch. D. 502.

(37) *Bridgewater Navigation Co.* [1891] 2 Ch. 317.

(38) *See Hoare & Co.* [1904] 2 Ch. 208.

(39) *Drown v. Gaumont British Picture Corpn.* [1937] 1 Ch. 402.

(40) *Oxford Building Society* (supra) at p. 509; *Leeds Estate Co. v. Shepherd* [1887] 36 Ch. D. 787.

(41) *Kingston Cotton Mills* [1896] 1 Ch. 331, 346.

(42) *Rance's case* [1870] 6 Ch. App. 104.

(43) *Oxford Building Society* (supra); but see s. 543 and notes.

(44) [1899] 2 Ch. 392.

with such care as is reasonably to be expected from them having regard to their knowledge and experience—and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. We believe this statement of the law to be correct and we adopt it as our guide" (45).

Although improper payment of dividend will be restrained by injunction on an action brought by a shareholder, a simple creditor cannot bring such an action on the ground that the fund for payment of his debt is thereby diminished (46), nor can a debenture-stock holder, unless he can show that he has a presently enforceable security (47), maintain such an action even though the assets of the company are insufficient to provide for payment of the so-called loan capital (47).

Directors who are knowingly parties to the payment of dividend out of capital are liable to proceedings by action, or in the case of winding up, by misfeasance summons under s. 543 (48). Where the directors fall short of the standard of care which they ought to apply to the affairs of the company, the onus is upon them to show that the dividends have been paid out of profits (49).

**907. Who can sue and obtain injunction :—**An individual member can maintain an action in his own name without bringing it on behalf of other persons and himself to restrain the corporation from doing an *ultra vires* act (50). But if a dividend has been paid out of capital no individual shareholder, who has received his dividend with knowledge of all the facts and still retains it, can maintain an action against the directors to compel them to pay to the company the amount wrongly distributed as dividend (51).

Preference shareholders may obtain an injunction to restrain a proposed payment of an interim dividend in excess of that authorised by the articles (52), or of any ordinary dividend in prejudice of their rights (53).

**908. Language of previous Acts :—**The language of Table A of the English Act of 1862 as also of the Indian Act of 1882 was "out of the profits arising from the business of the company." The language of the present section is much wider.

**206. Dividend<sup>†</sup> not to be paid except to registered shareholders or to their order or to their bankers.—**(1) No dividend shall be paid by a company in respect of any share therein, except—

(a) to the registered holder of such share or to his order or to his bankers ; or

(b) in case a share warrant has been issued in respect of the share in pursuance of section 114, to the bearer of such warrant or to his bankers.

(45) *National Bank of Wales* [1899] 2 Ch. 629 at p. 671.

(46) *Mills v. Northern Ry.* [1870] 5 Ch. App. 621.

(47) *Lawrence v. West Somerset Ry. Co.* [1918] 2 Ch. 250.

(48) *Prefontaine v. Grenier* [1907] A.C. 101 (P.C.).

(49) *Leeds Estates &c. v. Shepherd* (supra).

(50) *Hoole v. Great Western Ry. Co.* [1867] 3 Ch. App. 262.

(51) *Towers v. African Tug Co.* [1904] 1 Ch. 558.

(52) *Durlacher v. Hotchkiss Ordnance Co.* [1887] 3 T.L.R. 807.

(53) *Foster v. Coles* [1906] 22 T.L.R. 555.

(2) Nothing contained in sub-section (1) shall be deemed to require the bankers of a registered shareholder to make a separate application to the company for the payment of the dividend.

This section is new. It prohibits the payment of dividend except to a registered shareholder or to his order or to his bankers ---*Notes on Clauses.*

This was originally cl. 191 of the Bill in which alterations have been made by the Joint Committee with the following remark : "The clause has been amended so as to provide that where a share-warrant has been issued in respect of shares under clause 113, (now s. 114) the dividend may be paid to the bearer of such warrant or to his bankers" (*vide* J. C. R., para 81).

**207. Penalty for failure to distribute dividends within three months.**—Where a dividend has been declared by a company but has not been paid, or the warrant in respect thereof has not been posted, within three months from the date of the declaration, to any shareholder entitled to the payment of the dividend, every director of the company ; its managing agent or secretaries and treasurers ; and where the managing agent is a firm or body corporate, every partner in the firm and every director of the body corporate ; and where the secretaries and treasurers are a firm, every partner in the firm and where they are a body corporate, every director thereof; shall, if he is knowingly a party to the default, be punishable with simple imprisonment for a term which may extend to seven days and shall also be liable to fine :

Provided that no offence shall be deemed to have been committed within the meaning of the foregoing provision in the following cases, namely :—

(a) where the dividend could not be paid by reason of the operation of any law ;

(b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with ;

(c) where there is a dispute regarding the right to receive the dividend ;

(d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder ; or

(e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period aforesaid was not due to any default on the part of the company.

This section also is new. It provides for a penalty in the event of non-payment of the dividend within three months of the date of the declaration thereof—*Notes on Clauses.*

This was originally cl. 192 of the Bill in which alterations have been made by the Joint Committee with the following observation : "Where any default in the payment of a dividend within the time limit, is not due to the negligence of the company, the Committee consider that the Company should not be made punishable for the default. This is provided for in new sub-clause (c) of the proviso, while new sub-clause (d) thereof specifically provides for the case where the dividend payable to a shareholder has been lawfully adjusted against any sum due to the company from him" (*vide* J. C. R., para 82).

### *Payments of interest out of capital*

**208. Power of company to pay interest out of capital in certain cases.**—(1) Where any shares in a company are issued for the purpose of raising money to defray the expenses of the construction of any work or building, or the provision of any plant, which cannot be made profitable for a lengthy period, the company may—

(a) pay interest on so much of that share capital as is for the time being paid up, for the period and subject to the conditions and restrictions mentioned in sub-sections (2) to (7); and

(b) charge the sum so paid by way of interest, to capital as part of the cost of construction of the work or building or the provision of the plant.

(2) No such payment shall be made unless it is authorised by the articles or by a special resolution.

(3) No such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Central Government.

The grant of such sanction shall be conclusive evidence, for the purposes of this section, that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section.

(4) Before sanctioning any such payment, the Central Government may, at the expense of the company, appoint a person to inquire into, and report to the Central Government on, the circumstances of the case; and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry.

(5) The payment of interest shall be made only for such period as may be determined by the Central Government;

and that period shall in no case extend beyond the close of the half-year next after the half-year during which the work or building has been actually completed or the plant provided.

(6) The rate of interest shall in no case exceed four per cent. per annum or such other rate as the Central Government may, by notification in the Official Gazette, direct.

(7) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

(8) Nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895 (X of 1895), or the Indian Tramways Act, 1902 (IV of 1902), applies.

This section corresponds to s. 107 of the previous Act and s. 65 of the English Act of 1948. The provisions relating to the interest to be shown in the accounts contained in sub-s. (7) of s. 107 of the old Act have been omitted as they have been provided for in the form of the balance-sheet, in accordance with the C. I. C. s recommendation at page 301 of their Report *Notes on Clauses*.

**909. Payment must be made in good faith :—**Interest on advance before the call is made may be paid out of capital, if so authorized by the articles, provided that the directors make the payment in good faith and in the honest exercise of their discretion. The interest is due to the shareholder in the capacity of a creditor (54).

### *Accounts*

**209. Books of account to be kept by company .—(1)** Every company shall keep at its registered office or at such other place in India as the Board of directors thinks fit, proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place ;

(b) all sales and purchases of goods by the company ;  
and

(c) the assets and liabilities of the company.

(2) Where a company has a branch office, whether in or outside India, the company shall be deemed to have complied with the provisions of sub-section (1), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarised returns, made up to dates at intervals of not more than three months, are sent



by the branch office to the company at its registered office or the other place referred to in sub-section (1).

(3) For the purposes of sub-sections (1) and (2), proper books of account shall not be deemed to be kept with respect to the matters specified therein, if there are not kept such books as are necessary to give a true and fair view of the state of the affairs of the company or branch office, as the case may be, and to explain its transactions.

(4) The books of account shall be open to inspection by any director during business hours.

(5) If any of the persons referred to in sub-section (6) fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be punishable with fine which may extend to one thousand rupees :

Provided that in any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by the company with the requirements of this section, it shall be a defence to prove that he had reasonable ground to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty.

(6) The persons referred to in sub-section (5) are the following, namely :—

(a) where the company has a managing agent or secretaries and treasurers, such managing agent or secretaries and treasurers ;

(b) where such managing agent or secretaries and treasurers are a firm, every partner in the firm ;

(c) where such managing agent or secretaries and treasurers are a body corporate, every director of such body corporate ; and

(d) where the company has neither a managing agent nor secretaries and treasurers, every director of the company.

(7) If any person, not being a person referred to in sub-section (6), having been charged by the managing agent, secretaries and treasurers, or Board of directors, as the case may be,

with the duty of seeing that the requirements of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with fine which may extend to one thousand rupees.

This section corresponds to s. 130 of the previous Act and s. 147 of the English Act of 1948. It is based on the redraft of s. 130 suggested by the C. L.C. at p. 400 of their Report. It is considered sufficient if the accounts of the branch office are sent to the head office once in every *three* months instead of once in two months. The proviso to sub-s. (5) is based on the proviso to s. 147 (4) of the English Act—*Notes on Clauses*.

To this section sub-s. (7) has been added by the Lok Sabha.

**910. Accounts :—**The accounts of a company should be kept in a manner which prudent business people would adopt. A company is entitled to charge to capital account the interest on the borrowed money during the period of construction (55). As to the evidentiary value of entries in books of a company in a winding up, see s. 548 *post*.

**911. SUB-S. (4). Inspection by Directors :—**Under this subsection a director is entitled to make inspection of accounts not only personally but also through an agent, provided there is no reasonable objection to the person chosen as agent and the latter undertakes not to utilize the information obtained by him for any other purpose than the purpose of his principal (56).

**210. Annual accounts and balance sheet.—(1)** At every annual general meeting of a company held in pursuance of section 166, the Board of directors of the company shall lay before the company—

(a) a balance sheet as at the end of the period specified in sub-section (3) ; and

(b) a profit and loss account for that period.

(2) In the case of a company not carrying on business for profit, an income and expenditure account shall be laid before the company at its annual general meeting instead of a profit and loss account, and all references to “profit and loss account,” “profit” and “loss” in this section and elsewhere in this Act, shall be construed, in relation to such a company, as references respectively to the “income and expenditure account,” “the excess of income over expenditure,” and “the excess of expenditure over income”.

(3) The profit and loss account shall relate—

(a) in the case of the first annual general meeting of the company, to the period beginning with the incorpora-

(55) *Hinds v. Buenos Ayres & Co.* [1906] W.N. 187, [1906] 2 Ch. 654.

(56) *Vapharia v. Supreme G. P. Exchange Co.* [1948] 50 Bom. L.R. 140.

tion of the company and ending with a day which shall not precede the day of the meeting by more than nine months; and

(b) in the case of any subsequent annual general meeting of the company, to the period beginning with the day immediately after the period for which the account was last submitted and ending with a day which shall not precede the day of the meeting by more than nine months, or in cases where an extension of time has been granted for holding the meeting under the proviso to section 166 (1) (c), by more than nine months and the extension so granted.

(4) The period to which the account aforesaid relates is referred to in this Act as a "financial year"; and it may be less or more than a calendar year, but it shall not exceed fifteen months :

**Provided that it may extend to eighteen months where special permission has been granted in that behalf by the Registrar.**

(5) If any person, being a director of a company, fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both :

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that he had reasonable ground to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty :

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

(6) If any person, not being a director of the company, having been charged by the Board of directors with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with bot

**Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.**

This section corresponds to s. 131 of the previous Act and s. 148 of the English Act of 1948. The first proviso to sub-s. (5) is based on the proviso of s. 149 (3) of the English Act. Sub-s. (3) specifies the period with reference to which the profit and loss account should be made up, and sub-s. (4) defines this period as a "financial year" for the purposes of the Act—*Notes on Clauses*.

Sub-s. (6) and Proviso have been added by the Lok Sabha.

**912.** A company is under a statutory duty to issue proper balance-sheet and the existence of some disputes regarding amounts due to the company does not relieve the company from such duty (57).

**913. Scope of section :—**When a company fails to get its accounts balanced and a balance-sheet prepared and to make a list of its members, it should be convicted under this section rather than under s. 220. That the accounts had been called for by various criminal Courts in connection with other cases is no defence (58).

**914. Internal reserve fund :—**A provision in the articles of association that the directors may form an internal reserve fund on the terms that it need not be disclosed in the balance-sheet nor shall the auditors disclose the same to the shareholders, is *ultra vires* and inconsistent with the provisions of this section (59).

**915. Auditor's certificate and liability :—**As to the powers and duties of auditors, see s. 227 and notes thereto. The auditor will be liable for improper payments made by the directors and naturally resulting from his breach of duty (60). Where the auditor's certificate of the net profits of the company has been given on a wrong principle, it is not conclusive, and the Court is not bound by it (61). Auditors signing the auditors' report in a false balance-sheet which is to the effect that in their opinion the balance-sheet is drawn up in conformity with law and exhibits a true and correct view of the company's affairs, wilfully make a false statement in the report and are liable to prosecution under s. 628 (62).

The opinion of an accountant or an auditor that a balance-sheet which does not disclose the true state of affairs of a company has been properly drawn up, is of no value and no opinion expressed by an auditor or accountant can turn a false balance-sheet into a true one (63).

**916. Auditor's duties :—**The duty of an auditor is to give information in direct and express terms (64), and not merely to arouse inquiry (65). To insert a lump sum in a balance-sheet for goodwill, trade marks, machinery, and fixtures without giving separate value for each class is not a compliance with the law (66). For fuller notes see those to s. 227. For form of a balance-sheet see Schedule VI.

**917. Jurisdiction of Magistrate :—**A Magistrate has jurisdiction to entertain a complaint against a director for failure to comply with the provisions of this

(57) Punjab Flying Club Ltd. [1933] L. 301.

(58) Ajit v. Emp. [1934] C. 63, 37 C.W.N. 1159.

(59) Newton v. Birmingham Small Arms Co. [1906] 2 Ch. 378.

(60) Spackman v. Evans [1868] L.R. 3 H.L. 171 at pp. 196 & 235.

(61) Jolmston v. Chestergate Hat Manfg. Co. [1915] 2 Ch. 338; Crickton's Oil Co., (infra).

(62) O. L. Karachi Bank v. Directors & others, Karachi Bank [1932] S. 4, 134 I.C. 993.

(63) Superintendent & Remembrancer of Legal Affairs v. Akhil Bandhu [1936] C. 680 (685), 40 C.W.N. 1341.

(64) London & General Bank No. 2 [1895] 2 Ch. 673.

(65) Crickton's Oil Co. [1901] 2 Ch. 184, on appeal [1902] 2 Ch. 86.

(66) Galoway v. Schill, Seeborn & Co. [1912] 2 K.B. 354.

section. But ordinarily a Magistrate should be chary of proceeding on a complaint of this kind except after reference to the Registrar or on the complaint of a responsible person (67).

There was nothing in the old Act to suggest that the complaint of the Registrar was necessary before a prosecution of a company or its directors could be entertained (68). See now s. 621.

**918. Registrar's complaint :-** It was held by the Punjab Chief Court that the Registrar being the only person authorized by the Local Government under s. 220 (b) of Act VI of 1882 for instituting and conducting all prosecutions under the Act, especially where the prosecutions were in connection with a breach of the rules relating to submission of the balance-sheet and other periodical returns, a complaint for wilful default in filing a balance-sheet not brought by the Registrar but by a clerk of his office and counter-signed by the Public Prosecutor was bad in law and not entertainable by a criminal Court (69). But in a later case the same Court held otherwise (70), and so did the Nagpur Court (71). See now s. 621.

**919. Director's plea :-** A person who acts as a director or manager cannot set up in answer to prosecution that he was not legally a director or manager. Every person who at any time during the default in complying with the provisions of this section acted as a director or manager is liable to be convicted (72).

If a person joins a board of directors of a bank and allows his name to be used as a bait to induce the public to deal with the bank, he must take the consequence if he does not exercise due care and attention in signing a false balance-sheet, and the fact that he did not attend the meetings of the Board or had no knowledge of banking and accounts will not exonerate him from his liability, though he may be entitled to some sympathy on that account (73).

Where the balance-sheet is not made out and filed with the Registrar in time, the chairman of the Board of directors cannot escape liability on the ground that he depended upon the managing agents to take proper steps, and on several occasions asked them to do so (72). In such a case the fact that one of the members of the firm who acted as managing agents was also punished in his individual capacity as a director is no reason for not punishing him as a member of the firm (72).

**920. Punishment provided for false return etc. :-** In addition to the penalties imposed in sub s. (3) of section 133 of the old Act if any person in any return, report, certificate, balance-sheet or other document required by or for the purposes of this Act wilfully made a statement false in any material particular, knowing it to be false, he was liable to be punished with imprisonment for a term which might extend to three years and also liable to fine (74).

**921. Contents of balance-sheet :-** A balance-sheet must not be a mere inventory, but must be in the nature of a pictorial representation of the trading position of the company, easily appreciated by persons reasonably able to understand commercial expressions and commercial conditions (75). A banker in drawing up a balance-sheet is as much bound to disclose an overdraft as a loan. Consequently

(67) *Sidheswar Ghose v. Emp.* [1911] 8 A.L.J. 1260, 12 I.C. 972.

(68) *Bhagirath v. Emp.* [1948] C. 42, 48 C.L.J. 236, 229 I.C. 109.

(69) *Emp. v. Shibdas* [1910] 35 P.W.R. 1010 (Cr.).

(70) *Totaram v. Emp.* [1916] 34 I.C. 962, 14 P.R. 1916 (Cr.), 17 Cr. L.J. 242.

(71) *Laxmi Narain v. Mahajan* [1928] N. 186, 29 Cr. L.J. 581, 109 I.C. 597.

(72) *Totaram v. Emp.*, supra.

(73) *O. L. Karachi Bank v. Directors* (1932) S. 4, 134 I.C. 993.

(74) *Vide* s. 282 of the old Act corresponding to s. 628 of the present Act; *O. L. Karachi Bank v. Directors* [1932] S. 4, 134 I.C. 993.

where there has been non-disclosure of an advance, it is immaterial whether it was a loan or an overdraft (75).

**922. Overdraft** :—Overdrafts are the usual accompaniments of current accounts. Overdrafts based on a deposit account is unknown (76).

**923. Balance-sheet when fraudulent** :—The balance-sheet of a company engaged in hazardous trade will not be considered delusive and fraudulent merely because an estimated value was put upon assets which were then in jeopardy and were subsequently lost or because the company was obliged to borrow money to pay the dividend provided the fact fairly appeared on the balance-sheet and the balance fairly represented profits (77).

**924. SUB-S. (4). Proviso** :—The proviso empowers the Registrar to extend the period to 18 months for any special reason. It does not authorize him to condone the failure to hold the annual general meeting in any particular year, nor does it enable him to condone the failure to lay before the general meeting a balance-sheet and profit and loss account or the income and expenditure account, as the case may be, made up to a date mentioned in the section (78). It has however been held by the Madras High Court that when the Registrar condones the delay in holding a general meeting, the delay in filing the balance-sheet before the general body at their meeting must also be deemed to have been condoned (79).

The words "the period" in the proviso to sub-s. (1) of s. 131 of the old Act applied to both the periods of 18 months as well as 9 months. One was the period "during which" that particular account should be laid before the general meeting, and the other was the period "for which" it should be prepared. The Registrar therefore had got the power to extend the period of 18 months in the special circumstances of the case (80). The proviso was a proviso to the entire section and there was no reason to treat it as a proviso only to the latter part of the section (80). Compare the corresponding sections of the English Act. S. 76 of the old Act did not say that the general meeting should be called for considering the balance-sheet etc. Such a meeting might be called for other purposes. It was therefore not correct to say if, "18 months" was unalterable under s. 76, that should equally be so under s. 131 of the old Act (80).

**925. Appeal** :—Where the conviction was not of the managing director, but of the company, an appeal by the former was not competent. The appeal in such a case was not properly instituted, unless it was by the company through some authorised agent (81).

**211. Form and contents of balance sheet and profit and loss account.**—(1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall, subject to the provisions of this section, be in the form set out in Part I of Schedule VI, or as near thereto as circumstances admit :

(75) Suptd. & Remembrancer of L. A. v. Akhil Bandhu [1936] 40 C.W.N. 1341.

(76) Suptd. & Remembrancer of L. A. v. Akhil Bandhu [1936] 40 C.W.N. 1341.

(77) Stringer's case [1869] 4 Ch. App. 475.

(78) Bhagirath v. Emp. [1948] C. 42, 48 C.L.J. 236, 229 I.C. 109—per Lodge J. See in this connection Registrar v. Dalmia Cement (Bharat) Ltd. [1955] M. 28, 67 M.L.W. 1033.

(79) In re Ramanujam [1941] M. 504. [1941] 1 M.L.J. 419, [1941] M.W.N. 225.

(80) Dalmia Cement (Bharat) Ltd. v. Registrar [1954] M. 276.

(81) Ajit v. Emp. (1934) C. 63, 37 C.W.N. 1159.

Provided that nothing contained in this sub-section shall apply to any insurance or banking company, or to any other class of company for which a form of balance sheet has been specified in or under the Act governing such class of company.

(2) Every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year and shall, subject as aforesaid, comply with the requirements of Part II of Schedule VI, so far as they are applicable thereto :

Provided that nothing contained in this sub-section shall apply to any insurance or banking company, or to any other class of company for which a form of profit and loss account has been specified in or under the Act governing such class of company.

(3) The Central Government may, by notification in the Official Gazette, exempt any class of companies from compliance with any of the requirements in Schedule VI if, in its opinion, it is necessary to grant the exemption in the national interest.

Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

(4) The Central Government may, on the application or with the consent of the Board of directors of the company, by order, modify in relation to that company any of the requirements of this Act as to the matters to be stated in the company's balance sheet or profit and loss account for the purpose of adapting them to the circumstances of the company.

(5) The balance sheet and the profit and loss account of a company shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose—

(i) in the case of an insurance company, any matters which are not required to be disclosed by the Insurance Act, 1938 (IV of 1938) ;

(ii) in the case of a banking company, any matters which are not required to be disclosed by the Banking Companies Act, 1949 (X of 1949) ;

(iii) in the case of a company engaged in the generation or supply of electricity, any matters which are not required to be disclosed by the Electricity Supply Act, 1948 (LIV of 1948) ;

(iv) in the case of a company governed by any other special Act for the time being in force, any matters which are not required to be disclosed by that special Act ; or

(v) in the case of any company, any matters which are not required to be disclosed by virtue of the provisions contained in Schedule VI or by virtue of a notification issued under sub-section (3) or an order issued under sub-section (4).

(6) For the purposes of this section, except where the context otherwise requires, any reference to a balance sheet or profit and loss account shall include any notes thereon or documents annexed thereto, giving information required by this Act, and allowed by this Act to be given in the form of such notes or documents.

(7) If any such person as is referred to in sub-section (6) of section 209 fails to take all reasonable steps to secure compliance by the company, as respects any accounts laid before the company in general meeting, with the provisions of this section and with the other requirements of this Act as to the matters to be stated in the accounts, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both :

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that he had reasonable ground to believe and did believe that a competent and reliable person was charged with the duty of seeing that the provisions of this section and the other requirements aforesaid were complied with and was in a position to discharge that duty :

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

(8) If any person, not being a person referred to in sub-section (6) of section 209, having been charged by the managing agent, secretaries and treasurers, or Board of directors, as the case may be, with the duty of seeing that the provisions of this section and the other requirements aforesaid are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both :



**Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.**

This section corresponds to s. 132 of the previous Act and s. 149 of the English Act of 1948. It is based on the redraft of s. 132 suggested at pages 401 and 402 of the C.L.C.R. Sub-s. (3) provides for the exemption of any company or class of companies from compliance with the requirements laid down in the Act if in the opinion of the Central Government the grant of exemption is necessary in the national interest. Sub-s. (4) is based on sub-s. (5) of the redraft at page 401 of the C.L.C.R. Sub-s. (5) (i) and (ii) contains a special provision in regard to banking companies. Those companies, by reason of the non-disclosure of any matters which are exempted from disclosure by virtue of the Banking Companies Act or the Insurance Act, should not be regarded as not disclosing their true and fair view of the affairs. Sub-s. 5 (iii) makes the provision in the case of other companies which have been exempted from giving information either by virtue of Schedule VI of the Act or by virtue of a notification or order issued under sub-s. (3) or sub-s. (4) of this section—*Notes on Clauses*.

This was originally cl. 196 of the Bill. Sub-cl. (5) thereof has been re-cast by the Joint Committee so as to bring into conformity with s. 610 (now s. 616). All the cases specified in that section have now been specified in this section also—see the new sub-s. (5) (iii) and (iv) (*vide* J.C.R., para 83).

The Provisos to sub-ss. (1) and (2) as well as sub-s. (8) and its Proviso have been added by the Lok Sabha.

**926.** A statement which lumped together assets valued on one principle with assets valued on another, and tangible with intangible assets, is not a compliance with the provisions of this section (82).

**927. Book-debts** :—All debts which are entered in the current books of the company should be included under the head of book-debts. A debt is none the less a debt, though there may be little prospect of its recovery and the company may have means of covering the deficit if it is not paid. It is always open to a company to write off debts that in its opinion are entirely irrecoverable; and on that being done such debts would cease to be "book-debts". Therefore all genuine book-debts must be covered by the entry against this item whether they considered good, doubtful or bad debts, and the clear provision of the Form F of the old Act could not be whittled down by general consideration as to the object of a balance-sheet (83).

**928. Balance-sheet of banks** :—Immediately after the decision in *Shamdasani v. Pochkanwalla* (84), the Governor General in Council made important exceptions with regard to the balance-sheets of banks by altering Form F (Sch. III) of the old Act under the power vested in him by s. 151 of the old Act. The effect of these alterations was that in the case of banks (1) provision for bad and doubtful debts was not requisite, (2) bad and doubtful debts were not required to be mentioned where provision for them had been made to the satisfaction of the auditors. For this Form F a new Form F was substituted by the Companies (Amendment) Act, 1936. Therefore a similar notification was issued on 16th January, 1937. But see the case noted below (85).

The words "assets and liabilities" must be taken in the same sense in both the sections, *i.e.*, ss. 130 and 132 (1) (of the old Act) (85).

(82) *Galloway v. Schill, Sebohm & Co.* [1912] 2 K. B. 354.

(83) *Shamdasani v. Pochkanwalla* [1927] B. 414, 28 Bom. L.R. 722. See also *Queen-Empress v. Moss* [1894] 16 All. 88.

(84) *Ibid.*

**929. Secret reserve :—**If any part of a secret reserve is availed of to meet bad and doubtful book-debts (it is doubtful whether any secret reserve fund is permissible) it must be revealed in the balance-sheet and not concealed (86).

**930. Writing back to profit account :—**Mr. Justice Russel has said in the following case—"Unless there is anything in the Companies Act or in the constitution of the company to prohibit it, the shareholders may, if they think fit, write back to profit account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirement" (87).

As to profit and loss account, see notes to s. 205.

**212. Balance sheet of holding company to include certain particulars as to its subsidiaries.—**(1) There shall be attached to the balance sheet of a holding company having a subsidiary or subsidiaries at the end of the financial year as at which the holding company's balance sheet is made out, the following documents in respect of such subsidiary or of each such subsidiary, as the case may be :—

- (a) a copy of the balance sheet of the subsidiary ;
  - (b) a copy of its profit and loss account ;
  - (c) a copy of the report of its Board of directors ;
  - (d) a copy of the report of its auditors ;
  - (e) a statement of the holding company's interest in the subsidiary as specified in sub-section (3) ;
  - (f) the statement referred to in sub-section (5), if any ;
- and
- (g) the report referred to in sub-section (6), if any.

(2) (a) The balance sheet referred to in clause (a) of sub-section (1) shall be made out, in accordance with the requirements of this Act, as at the end of the financial year of the subsidiary next before the day as at which the holding company's balance sheet is made out.

(b) The profit and loss account and the reports of the Board of directors and of the auditors, referred to in clauses (b), (c) and (d) of sub-section (1), shall be made out, in accordance with the requirements of this Act, for the financial year of the subsidiary referred to in clause (a).

(c) The financial year aforesaid of the subsidiary shall not end on a day which precedes the day on which the holding company's financial year ends by more than six months.

(d) Where the financial year of a subsidiary is shorter in duration than that of its holding company, references to the

(85) *Shamdassani v. Central Bank of India* [1944] B. 107 (S.B.), 46 Bom. L.R. 70.

(86) *Shamdassani v. Pochkanwalla*, (supra). See Stiebel's *Company Law*, 2nd ed. p. 485 ; *Palmer's Company Precedents*, 15th ed. [1938] Part I. p. 716.

(87) *Stapley v. Read Brothers Ltd.* [1924] 2 Ch. 1 (5).

financial year of the subsidiary in clauses (a), (b) and (c) shall be construed as references to two or more financial years of the subsidiary the duration of which, in the aggregate, is not less than the duration of the holding company's financial year.

(3) The statement referred to in clause (e) of sub-section (1) shall specify—

(a) the extent of the holding company's interest in the subsidiary at the end of the financial year or of the last of the financial years of the subsidiary referred to in sub-section (2) ;

(b) the net aggregate amount, so far as it concerns members of the holding company and is not dealt with in the company's accounts, of the subsidiary's profits after deducting its losses or *vice versa*—

(i) for the financial year or years of the subsidiary aforesaid ; and

(ii) for the previous financial years of the subsidiary since it became the holding company's subsidiary;

(c) the net aggregate amount of the profits of the subsidiary after deducting its losses or *vice versa*—

(i) for the financial year or years of the subsidiary aforesaid ; and

(ii) for the previous financial years of the subsidiary since it became the holding company's subsidiary ; so far as those profits are dealt with, or provision is made for those losses, in the company's accounts.

(4) Clauses (b) and (c) of sub-section (3) shall apply only to profits and losses of the subsidiary which may properly be treated in the holding company's accounts as revenue profits or losses, and the profits or losses attributable to any shares in a subsidiary for the time being held by the holding company or any other of its subsidiaries shall not (for that or any other purpose) be treated as aforesaid so far as they are profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries, except that they may in a proper case be so treated where—

(a) the company is itself the subsidiary of another body corporate ; and

(b) the shares were acquired from that body corporate or a subsidiary of it ;

and for the purpose of determining whether any profits or losses are to be treated as profits or losses for the said period, the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.

(5) Where the financial year or years of a subsidiary referred to in sub-section (2) do not coincide with the financial year of the holding company, a statement containing information on the following matters shall also be attached to the balance sheet of the holding company :—

(a) whether there has been any, and, if so, what change in the holding company's interest in the subsidiary between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company's financial year ;

(b) details of any material changes which have occurred between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company's financial year in respect of—

- (i) the subsidiary's fixed assets ;
- (ii) its investments ;
- (iii) the moneys lent by it ;
- (iv) the moneys borrowed by it for any purpose other than that of meeting current liabilities.

(6) If, for any reason, the Board of directors of the holding company is unable to obtain information on any of the matters required to be specified by sub-section (4), a report in writing to that effect shall be attached to the balance sheet of the holding company.

(7) The documents referred to in clauses (e), (f) and (g) of sub-section (1) shall be signed by the persons by whom the balance sheet of the holding company is required to be signed.

(8) The Central Government may, on the application or with the consent of the Board of directors of the company, direct that in relation to any subsidiary, the provisions of this section shall not apply, or shall apply only to such extent as may be specified in the direction.

(9) If any such person as is referred to in sub-section (6) of section 209 fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each

offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both :

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that he had reasonable ground to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty :

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

(10) If any person, not being a person referred to in subsection (6) of section 209, having been charged by the managing agent, secretaries and treasurers, or Board of directors, as the case may be, with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both :

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

This section corresponds to s. 132A of the previous Act and s. 150 of the English Act of 1948. It is largely based on s. 133 of the redraft suggested at pages 402 to 404 of the C. L. C. R. Sub-ss. (3), (4) and (5) incorporate the provisions contained in para 15 (4) and (5) of Schedule VIII of the English Companies Act with appropriate changes, necessitated by the fact that the Act provides for the accounts of each subsidiary company being attached to the balance sheet of the holding company instead of providing as in the English Act for the submission of consolidated group accounts for the holding company and the subsidiaries together - *Notes on Clauses*. Some verbal changes have been made in this section by the Joint Committee.

Sub-s. (10) and its Proviso have been added by the Lok Sabha.

**213. Financial year of holding company and subsidiary.**—(1) Where it appears to the Central Government desirable for a holding company or a holding company's subsidiary, to extend its financial year so that the subsidiary's financial year may end with that of the holding company, and for that purpose to postpone the submission of the relevant accounts to a general meeting, the Central Government may, on the application or with the consent of the Board of directors of the company whose financial year is to be extended, direct that in the case of that company, the submission of accounts to a general meeting, the holding of an annual general

meeting or the making of an annual return, shall not be required to be submitted, held or made, earlier than the dates specified in the direction, notwithstanding anything to the contrary in this Act or any other Act for the time being in force.

(2) The Central Government shall, on the application of the Board of directors of a holding company or a holding company's subsidiary, exercise the powers conferred on that Government by sub-section (1) if it is necessary so to do, in order to secure that the end of the financial year of the subsidiary does not precede the end of the holding company's financial year by more than six months, where that is not the case at the commencement of this Act, or at the date on which the relationship of holding company and subsidiary comes into existence where that date is later than the commencement of this Act.

This section is new. It is based on sub-s. (5) of the redraft at p. 403 of the C. I. C. R. and s. 153 of the English Act of 1948. The case where the financial year of the holding company and the subsidiary have to be modified so as to be brought into entire accord with each other and the case where they are to be brought only within six months of each other have been dealt with separately. In the former case the exercise of the Government's power will be discretionary whereas in the latter case it will be obligatory—*Notes on Clauses*.

Some verbal changes have been made in this section by the Joint Committee.

**214. Rights of holding company's representatives and members.**—(1) A holding company may, by resolution, authorise representatives named in the resolution to inspect the books of account kept by any of its subsidiaries; and the books of account of any such subsidiary shall be open to inspection by those representatives at any time during business hours.

(2) The rights conferred by section 235 upon members of a company may be exercised, in respect of any subsidiary, by members of the holding company as if they alone were members of the subsidiary.

This section also is new. It is based on sub-ss. (6) and (7) of the C. I. C.'s redraft of s. 133—*Notes on Clauses*.

Some verbal changes have been made in this section also by the Joint Committee.

**215. Authentication of balance sheet and profit and loss account.**—(1) Save as provided by sub-section (2), every balance sheet and every profit and loss account of a company shall be signed on behalf of the Board of directors—

(i) in the case of a banking company, by the persons specified in clause (a) or clause (b), as the case may be, of sub-section (2) of section 29 of the Banking Companies Act, 1949 (X of 1949) ;

(ii) in the case of any other company, by its managing agent, secretaries and treasurers, manager or secretary, if any, and by not less than two directors of the company one of whom shall be a managing director where there is one.

(2) In the case of a company not being a banking company, when only one of its directors is for the time being in India, the balance sheet and the profit and loss account shall be signed by such director ; but in such a case there shall be attached to the balance sheet and the profit and loss account a statement signed by him explaining the reason for non-compliance with the provisions of sub-section (1).

(3) The balance sheet and the profit and loss account shall be approved by the Board of directors before they are signed on behalf of the Board in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon.

This section corresponds to s. 133 of the previous Act and s. 155 of the English Act of 1948. It is based on s. 134 of the C. L. C.'s redraft at pages 404 and 405 of their Report—*Notes on Clauses*.

Some alterations have also been made in this section by the Joint Committee

**931. Effect of signing acknowledgement of liability** :—The mere signing a balance-sheet by a director does not make it an account stated involving a fresh promise by the director to pay the amount debited to him therein, inasmuch as a director signs the balance-sheet not *animo contrahendi* but in performance of his duties as director (88). Similarly balance-sheets including fees due to directors and signed by directors are not acknowledgments or written promises to pay those fees by the company (89). It has however been held in England that the balance-sheet presented to the plaintiff (a shareholder) at the meeting of the company fulfilled all the requirements of s. 24 of the English Limitation Act, and therefore there was an acknowledgement by the company of the plaintiff's debt, and the plaintiff's right of action must be deemed to have accrued on the date of acknowledgement so that his claim was not barred (90). The same has been held in a recent case by the Madras High Court (91).

**932.** Persons who were never directors or officers of the company when the default occurred in preparing a balance-sheet and placing it before a general meeting cannot be held liable in respect of offences in not complying with the provisions

(88) *John Shaw & Sons (Salford) Ltd. v. Shaw* [1935] 2 K.B. 113 (C.A.) ; *Kashinath v. New Akot C. G. & Pressing Co.* [1951] N. 255, [1950] Nag. 582.

(89) *Coliseum (Barrow) Ltd.* [1936] 2 Ch. 44.

(90) *Jones v. Bellgrove Properties Ltd.* [1949] 2 A.E.R. 198.

(91) *Raja of Vizianagram v. O. L. Vizianagram Mining Co.* [1952] M. 136.

of s. 210 (92). The charge of non-filing of the balance-sheet receives a complete answer, if the accused can show that the balance-sheet was not due ; it is altogether immaterial whether it has or has not been prepared (93).

**216. Profit and loss account to be annexed and auditors' report to be attached to balance sheet.—**The profit and loss account shall be annexed to the balance sheet and the auditors' report shall be attached thereto.

This section is based on s. 131 (2) of the previous Act and s. 156 (1) of the English Act of 1948 which has been reproduced in s. 134 (4) of the redraft at p. 404 of the C. L. C. R.—*Notes on Clauses*.

See notes to ss. 210 and 215.

**217. Board's report.—**(1) There shall be attached to every balance sheet laid before a company in general meeting, a report by its Board of directors, with respect to—

- (a) the state of the company's affairs ;
- (b) the amounts, if any, which it proposes to carry to any reserves either in such balance sheet or in a subsequent balance sheet ; and
- (c) the amount, if any, which it recommends should be paid by way of dividend.

(2) The Board's report shall, so far as is material for the appreciation of the state of the company's affairs by its members and will not in the Board's opinion be harmful to the business of the company or of any of its subsidiaries, deal with any changes which have occurred during the financial year—

- (a) in the nature of the company's business ;
- (b) in the company's subsidiaries or in the nature of the business carried on by them ; and
- (c) generally in the classes of business in which the company has an interest.

(3) The Board shall also be bound to give the fullest information and explanations in its report aforesaid, or in cases falling under the proviso to section 222, in an addendum to that report, on every reservation, qualification or adverse remark contained in the auditors' report.

(4) The Board's report and any addendum thereto shall be signed by its chairman if he is authorised in that behalf

(92) In re Narasimha Rao [1937] M. 341, 169 I.C. 100.

(93) Lakshmana v. Emp. [1932] M. 497, 35 M.L.W. 661.



by the Board ; and where he is not so authorised, shall be signed by such number of directors as are required to sign the balance sheet and the profit and loss account of the company by virtue of sub-sections (1) and (2) of section 215.

(5) If any person, being a director of a company, fails to take all reasonable steps to comply with the provisions of sub-sections (1) to (3), or being the chairman, signs the Board's report otherwise than in conformity with the provisions of sub-section (4), he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both :

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully :

Provided further that in any proceedings against a person in respect of an offence under sub-section (1), it shall be a defence to prove that he had reasonable ground to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the provisions of that sub-section were complied with and was in a position to discharge that duty.

(6) If any person, not being a director, having been charged by the Board of directors with the duty of seeing that the provisions of sub-sections (1) to (3) are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both :

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

This section corresponds to s. 131A of the previous Act and s. 157 of the English Act of 1948 and is based on s. 135 of the re-draft of C. L. C. at page 405 of their Report—*Notes on Clauses*.

This was originally cl. 202 of the Bill in which alterations have been made by the Joint Committee with the following observation: "The Committee consider that where any proceedings have been instituted against the director of a company for failure to comply with any of the provisions of sub-clause (1) of this clause, he must be permitted to defend himself on the ground that he had reasonable ground to believe, and did believe, that a competent person was charged with the duty of complying with those provisions and was in a position to discharge that duty—Compare the proviso to clause 210, sub-clause (5)" (*vide J. C. R. para 84*).

Sub-s. (4) of this section has been amplified and sub-s. (6) and its Proviso have been added by the Lok Sabha.

**933. SUB-S. (1). Reserve fund :—**The word "Reserve" has not been defined in the Act. It should be given the ordinary and natural meaning as understood in common parlance. The reserve may be a general reserve or a specific reserve; but there must be a clear indication that it was a reserve either of the one or the other kind. Profits lying unutilized and not specifically set apart for any purpose on the crucial date would not constitute reserves within the meaning of Sch. II R. 2 (1) of the Business Profits Act, 1947 (94). These words cannot be given a wider meaning in Business Profits Act than the one given in s. 131A or Reg. 99 of Table A of the old Act (95). Further unless the directors apply their mind to the question and make appropriation of the balance to the payment of dividends or to building up reserves, it is difficult to say that any portion of the amount of balance in the profit and loss account could be treated as "reserve" or "reserves" for the purpose of computing the amount of capital under R. 2 of Sch. II of the Business Profits Act, 1947 (95).

**934. Director's liability for report :—**A director is not necessarily personally responsible for reports and balance-sheets stated to be issued "by order of the directors" (96). As to a person who, though named as a director but has resigned, see the case of *Dovey v. Cory* (97).

Balance-sheet contained in an annual report sent by the company to the shareholders and filed with the Registrar stating the total amount of the company's indebtedness under its debentures for principal and interest, although not sent to the debenture-holders, is a sufficient acknowledgement of the liability under the debentures (98).

**218. Penalty for improper issue, circulation or publication of balance sheet or profit and loss account.—(a)** If any copy of a balance sheet or profit and loss account which has not been signed as required by section 215 is issued, circulated or published; or

(b) If any copy of a balance sheet is issued, circulated or published without there being annexed or attached thereto, as the case may be, a copy each of (i) the profit and loss account, (ii) any accounts, reports or statements which, by virtue of section 212, are required to be attached to the balance sheet, (iii) the auditors' report, and (iv) the Board's report referred to in section 217;

the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

This section is new. It is based on s. 156 (3) of the English Act of 1948 and sub-s (5) of s. 134 of the C. L. C.'s redraft—*Notes on Clauses*.

Some verbal changes have been made in this section by the Joint Committee.

(94) *Comr. of Income-Tax v. Century Spinning & Manfg. Co.* [1953] S.C. 501. on appeal from [1951] B. 420.

(95) *Comr. of Income-Tax v. Bank of Bihar* [1954] Pat. 139.

(96) *Denham & Co.* [1884] 25 Ch. D. 752.

(97) [1901] A.C. 477.

(98) *Burnham (Viscount) v. Atlantic &c. Co.* [1928] Ch. 836.

**219. Right of member to copies of balance sheet and auditors' report—**(1) A copy of every balance sheet (including the profit and loss account, the auditors' report and every other document required by law to be annexed or attached, as the case may be, to the balance sheet) which is to be laid before a company in general meeting shall, not less than twenty-one days before the date of the meeting, be sent to every member of the company, to every holder of debentures issued by the company (not being debentures which *ex facie* are payable to the bearer thereof), to every trustee for the holders of any debentures issued by the company, whether such member, holder or trustee is or is not entitled to have notices of general meetings of the company sent to him, and to all persons other than such members, holders or trustees, being persons so entitled.

Provided that—

(a) in the case of a company not having a share capital, this sub-section shall not require the sending of a copy of the documents aforesaid to a member, or holder of debentures, of the company who is not entitled to have notices of general meetings of the company sent to him ;

(b) this sub-section shall not require a copy of the documents aforesaid to be sent—

(i) to a member, or holder of debentures, of the company, who is not entitled to have notices of general meetings of the company sent to him and of whose address the company is unaware ;

(ii) to more than one of the joint holders of any shares or debentures none of whom is entitled to have such notices sent to him ; or

(iii) in the case of joint holders of any shares or debentures some of whom are and some of whom are not entitled to have such notices sent to them, to those who are not so entitled ; and

(c) if the copies of the documents aforesaid are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by all the members entitled to vote at the meeting.

(2) Any member or holder of debentures of a company, whether he is or is not entitled to have copies of the company's

balance sheet sent to him shall, on demand, be entitled to be furnished without charge, and any person from whom the company has accepted a sum of money by way of deposit shall, on demand accompanied by the payment of a fee of one rupee, be entitled to be furnished, with a copy of the last balance sheet of the company and of every document required by law to be annexed or attached thereto, including the profit and loss account and the auditors' report.

(3) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(4) If, when any person makes a demand for a copy of any document with which he is entitled to be furnished by virtue of sub-section (2), default is made in complying with the demand within seven days after the making thereof, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees, unless it is proved that that person had already made a demand for and been furnished with a copy of the document.

The Court may also, by order, direct that the copy demanded shall forthwith be furnished to the person concerned.

(5) Sub-sections (1) to (4) shall not apply in relation to a balance sheet of a private company laid before it before the commencement of this Act; and in such a case the right of any person to have sent to him or to be furnished with a copy of the balance sheet, and the liability of the company in respect of a failure to satisfy that right, shall be the same as they would have been if this Act had not been passed.

This section corresponds to ss. 135 and 146 of the previous Act. It is based on s. 158 of the English Act of 1948 and s. 135A of the C. I. C.'s redraft—*Notes on Clauses*.

Some changes have been made in this section also by the Joint Committee.

Sub-s. (2) of this section has been added to by the Lok Sabha.

**220. Three copies of balance sheet, etc. to be filed with Registrar.**—(1) After the balance sheet and the profit and loss account have been laid before a company at an annual general meeting as aforesaid, there shall be filed with the Registrar at the same time as the copy of the annual return referred to in section 161—

(a) in the case of a public company, three copies of the balance sheet and the profit and loss account, signed by

the managing director, managing agent, secretaries and treasurers, manager or secretary of the company, or if there be none of these, by a director of the company, together with three copies of all documents which are required by this Act to be annexed or attached to such balance sheet or profit and loss account ;

(b) in the case of a private company, three copies of the balance sheet certified to be true copies by the company's auditors and of the auditors' report in so far as it relates to the balance sheet.

(2) If the annual general meeting of a public or private company before which a balance sheet is laid as aforesaid does not adopt the balance sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar.

(3) If default is made in complying with the requirements of sub-sections (1) and (2), the company, and every officer of the company who is in default, shall be liable to the like punishment as is provided by section 162 for a default in complying with the provisions of sections 159, 160 or 161.

This section corresponds to s. 134 of the previous Act and s. 127 of the English Act of 1948. It is based on s. 135B of the C. L. C.'s redraft at pages 406 and 407 of the C. L. C. R.—*Notes on Clauses*.

**935. Private company** :—If a private company issues prize bonds in the nature of debentures, it ceases to be a private company and is therefore bound to file its balance-sheet and the profit and loss account with the Registrar of Companies under this section. Default in filing the same renders the company and its directors liable to the penalty under sub-s (4) (99). See notes to s. 3 (iii) *ante*.

**936. Director's duty. Offence and punishment** :—It is the duty of all the directors of a company to see that the particular returns mentioned in this section are submitted. If the directors who are responsible for the management of the company and who personally know the duties imposed upon them by law make no attempt to see that these duties are carried out, there is justification for holding that they have wilfully and knowingly permitted the company to fail to carry out those duties, and therefore would be guilty of offences under s. 162 and this section (1).

It is not correct to say that a director who is guilty of a default under ss. 32 and 134 of the old Act should be punished with a nominal sentence in the absence of any allegation of dishonesty or fraud on his part. The provisions of the Act have been deliberately enacted to protect the shareholders and in some cases the general public. Consequently it is necessary that when the directors fail to do their duty, the penalties provided in the Act should be imposed and the directors should be substantially penalized (1).

(99) *Emp. v. Laxman* [1945] 47 Bom. L.R. 600.

(1) *Bhagirath v. Emp.* [1948] C. 42, 48 C.L.J. 236, 229 I.C. 109, *In re Gangipati Appayya* [1952] M. 800; *Viswanathan v. Asst. Registrar* [1953] M. 558, [1953] M.L.J. 408.

**937. Plea in answer to charge under this section :—**In answer to a charge under sub-s. (4) of s. 134 of the old Act in respect of default made in filing the balance-sheet for a certain year, it was not open to a director to plead that as no general meeting had been called in that year and no balance-sheet laid before the company at any such meeting, it was impossible for him or the company to comply with the requirements of the section, when the impossibility was due to his own previous default (1). But in order to bring the case within the rule laid down in *Park v. Lawton* (2), a person whose defence to a charge under sub-s. (4) was that compliance on his part with the requirements of the section was impossible on account of no general meeting having been held, it was necessary in the first instance to show with reference to s. 76 of the old Act that the accused officer of the company was knowingly a party to the default in holding the general meeting, and when the question had not been enquired into at all the case had not been properly tried and the conviction would not stand (3).

SS. 76 and 133 of the old Act created two distinct offences, viz., one for not holding the general meeting and another for not laying the balance-sheet before the general meeting. The former offence might give rise to the latter or even independently of it. Hence there was no case of the accused being prosecuted twice for the same offence (4). But it was previously held that the same persons could not be charged in respect of the same years with offences punishable both under s. 131 and s. 134 of the old Act, because s. 134 clearly contemplated the sending of a copy of balance-sheet only after it had been placed before the company at a general meeting under s. 131. Where in a case there was no placing of the balance-sheet before the company at a general meeting, the offence under this section could not be committed (5). In a recent case dissenting from *Debendra v. Registrar* (6) and explaining *Park v. Lawton* (2) it was held by the Bombay High Court that there was no obligation cast upon the company to file the balance-sheet etc. under sub-s. (1) if no general meeting had been called (7), and the company and its officers could not be convicted under sub-section (4) of this section although they might have committed offences under ss. 76 (2) and 133 (3) (7). of the old Act.

The default under s. 162 and this section must be intentional and not merely inadvertent (8).

**938. Recovery of fine :—**Where a fine is imposed upon a company under this section, the fine must be recovered from the company and cannot be recovered from the directors individually (9).

**939. Jurisdiction :—**The Presidency Magistrate in Calcutta possesses jurisdiction to try charges under this section even where the company is situate outside Calcutta, as the office of the Registrar with whom the balance-sheet is to be filed is in Calcutta (10).

**221. Duty of officer to make disclosure of payments, etc.—(1)** Where any particulars or information is required to be given in the balance sheet or profit and loss account of a

(2) [1911] 1 K.B. 588.

(3) *Raj Kumar v. King Emp.* [1917] 21 C.W.N. 840, 18 Cr. L.J. 325, 38 I.C. 437.

(4) *Viswanathan v. Asst. Registrar*, supra.

(5) *In re Narasimha* [1937] M. 341, 169 I.C. 100.

(6) [1918] 45 Cal. 486.

(7) *Emp. v. Pioneer C. & I. Works* [1948] B. 357, 50 Bom. L.R. 158, 49 Cr. L.J. 515.

(8) *Sunder Das v. Emperor* [1929] L. 836, 10 Lah. 521. See also *Public Prosecutor v. Lury & Co.* [1941] 2 M.L.J. 487, [1941] M.W.N. 1109 and *Surendra v. Emp.* [1941]

45 C.W.N. 1130.

(9) *Dwarka Das v. Emp.* [1924] L. 489, 26 Cr. L.J. 799, 86 I.C. 431.

(10) *Debendra v. Registrar* [1917] 45 Cal. 490, 22 C.W.N. 96.

company or in any document required to be annexed or attached thereto, it shall be the duty of the concerned officer of the company to furnish without delay to the company, and also to the company's auditor whenever he so requires, those particulars or that information in as full a manner as possible.

(2) Where the officer concerned is a firm or body corporate acting as managing agent or as secretaries and treasurers, the duty aforesaid shall extend to every partner in the firm, or to every director of the body corporate, as the case may be.

(3) The particulars or information referred to in sub-section (1) may relate to payments made to any director, managing agent, secretaries and treasurers, or other person by any other company, body corporate, firm or person.

(4) If any person knowingly makes default in performing the duty cast on him by the foregoing provisions of this section, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

This section is new. It is based on the following recommendation made in para 159 of the C. L. C. R.—*Notes on Clauses*: "It will be necessary to make a specific provision in the Act requiring every managing agent including every former managing agent to disclose the amounts received by him in respect of compensation from other parties and there should be a penal provision for non-compliance. Further, in respect of all matters relating to accounts where particulars or information are required to be given, a duty should be cast upon the person concerned to give the fullest information to the company and to its auditors on pain of a penalty."

**222. Construction of references to documents annexed to accounts.**—References in this Act to documents annexed or required to be annexed to a company's accounts or any of them shall not include the Board's report, the auditors' report or any document attached or required to be attached to those accounts :

Provided that any information which is required by this Act to be given in the accounts, and is allowed by it to be given in a statement annexed to the accounts, may be given in the Board's report instead of in the accounts ; and if any such information is so given, the report shall be annexed to the accounts and this Act shall apply in relation thereto accordingly, except that the auditors shall report thereon only in so far as it gives the said information.

This section is new. It is based on s. 169 of the English Act of 1948—*Notes on Clauses*.

**223. Certain companies to publish statement in the Form in Table F in Schedule I.**—(1) Every company which is a limited banking company, an insurance company, or a deposit, provident or benefit society, shall, before it commences business and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the Form in Table F in Schedule I, or in a Form as near thereto as circumstances admit.

(2) A copy of the statement, together with a copy of the last audited balance sheet laid before the members of the company, shall be displayed and until the display of the next following statement, shall be kept displayed, in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member, and every creditor, of the company shall be entitled, on payment of a sum of eight annas, to be furnished with a copy of the statement, within seven days of such payment.

(4) If default is made in complying with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Insurance Act, 1938 (IV of 1938), as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

This section corresponds to s. 136 of the previous Act and s. 433 of the English Act of 1948. Having regard to the provisions contained in s. 33 of the Banking Companies Act, 1949, it is unnecessary to retain the reference to banking companies in this section—*Notes on Clauses*. The Joint Committee however have restored the reference to banking companies.

**940. SUB-S. (1). Dates of statement** :—The omission of a limited company to publish the statements specified in sub-sec. (1) on the dates indicated in the section cannot be justified by the fact that the omission was due to a change in the closing date of the financial year of the company and that the officers of the company imagined in good faith that this justified a change in the dates on which statements were required to be published (1).



**941. SUB-S. (4) :—**Where there is nothing in the order of the Magistrate or in the summons to show that a particular person was summoned as representing the company, or that any proceedings were being taken against the company as such, the procedure in issuing a summons to such a person is clearly incorrect. Sub-s. (4) provides for a penalty against the company, and there is nothing to prevent the issue of a summons against the company itself. Sub-s. (3) of s. 69, Cr. P. Code provides for the service of such a summons (12).

### *Audit*

#### **224. Appointment and remuneration of auditors.—**

(1) Every company shall, at each annual general meeting, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting.

(2) At any annual general meeting, a retiring auditor, by whatsoever authority appointed, shall be re-appointed, unless—

(a) he is not qualified for re-appointment ;

(b) he has given the company notice in writing of his unwillingness to be re-appointed ;

(c) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed ; or

(d) where notice has been given of an intended resolution to appoint some person or persons in the place of a retiring auditor, and by reason of the death, incapacity or disqualification of that person or of all those persons, as the case may be, the resolution cannot be proceeded with.

(3) Where at an annual general meeting no auditors are appointed or reappointed, the Central Government may appoint a person to fill the vacancy.

(4) The company shall, within seven days of the Central Government's power under sub-section (3), becoming exercisable, give notice of that fact to that Government ; and, if a company fails to give such notice, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(5) The first auditor or auditors of a company shall be appointed by the Board of directors within one month of the date of registration of the company ; and the auditor or

auditors so appointed shall hold office until the conclusion of the first annual general meeting :

Provided that—

(a) the company may, at a general meeting, remove any such auditor or all or any of such auditors and appoint in his or their places any other person or persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting ; and

(b) if the Board fails to exercise its powers under this sub-section, the company in general meeting may appoint the first auditor or auditors.

(6) (a) The Board may fill any casual vacancy in the office of an auditor ; but while any such vacancy continues, the remaining auditor or auditors, if any, may act :

Provided that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting.

(b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(7) Except as provided in the proviso to sub-section (5), any auditor appointed under this section may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf.

(8) The remuneration of the auditors of a company—

(a) in the case of an auditor appointed by the Board or the Central Government, may be fixed by the Board or the Central Government, as the case may be; and

(b) subject to clause (a), shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

For the purposes of this sub-section, any sums paid by the company in respect of the auditors' expenses shall be deemed to be included in the expression "remuneration".

SS. 224 to 233 are mostly based on the draft ss. 144 to 145B suggested by the C. I. C. at pages 421 to 425 of the C. I. C. R. The corresponding sections of the English Act of 1948 are ss. 159-162—*Notes on Clauses*.

S. 224 corresponds to s. 144 (3) to (6) of the previous Act and s. 159 of the English Act of 1948. Sub-s. (7) provides for the removal of the auditor before the expiry of his term by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf. A provision is clearly necessary for the case where an existing auditor is unable to fulfil his duties for any reason or becomes obviously unsuitable for continuing in his appointment. The last paragraph of sub-s. (8) is based on the provision in the English Act—s. 159 (7), second paragraph—*Notes on Clauses*.

Some changes have been made in this section by the Joint Committee.

**942. SUB-S. (1) :—**The requirement of sub-s. (3) of the old s. 144 corresponding to sub-s. (1) of the present Act is mandatory (13).

**943. Auditor—whether an officer :—**An auditor may not be an “officer” of the company and *prima facie* he is not, except for the purposes of ss. 477, 478, 539, 543, 545, 621, 625 and 633 (14). In the undernoted case (15), the Allahabad High Court (Mearns C. J. & Sen J.) considered the question in connection with a clause in the articles of a company which dealt with the conduct of the company's business and provided that officers of the company would be entitled to an indemnity out of the fund of the company except in regard to their own “wilful acts or defaults.” After considering the following decisions (16), their Lordships observed : “The general result of the decisions is that where an auditor has been appointed by a limited liability company at a general meeting of the shareholders, he must be taken to be an officer of the company. It is not absolutely necessary that he should be mentioned as an officer in the articles of association. If things stood here, we might have felt considerable difficulty in holding the contrary. But we are confronted with the following facts : The term ‘officer’ had not been defined in Act VI of 1882, but in *Connell's* case (17) it had been held that an auditor was an officer of the company. There was a long train of reported English decisions in support of the same view. We find, however, that the legislature has introduced a statutory definition of the term ‘officer’ in s. 2, cl. (11), Act VII of 1913, which says that ‘officer’ includes any director, manager or secretary, but save in ss. 235, 236 and 237, does not include an auditor. We are bound by this statutory definition. In enacting Act VII of 1913 the legislature seems to have consciously departed from the view which had been taken in decided cases in the past so far as this country was concerned.” . . . “We hold therefore that an auditor cannot claim to be an officer within the purviews of Art. 118 of the Articles of Association” (18).

**944. “Wilful acts or defaults” :—**As to the meaning of the expression “wilful acts or defaults” used in the above clause in the articles of the company (as in the articles of many companies), their Lordships observe (18) as follows : “The adjective ‘wilful’ in ‘wilful acts or defaults’ has evidently been used as a description and not a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea

(13) *Council of Institute of Chartered Accountants v. Jnanendra* [1955] Ass. 8.

(14) S. 2 (30).

(15) *Hudson v. Dehradun Mussoorie Electric Tramway Co.* [1929] A. 826 at pp. 829-30, 121 I.C. 693.

(16) *London & General Bank No. 1* [1895] 2 Ch. 166; *Kingston Cotton Mill Co.* [1896] 2 Ch. 279, at pp. 284 & 288; *Ibid* [1896] 1 Ch. 6; *Western Countries S. B. & Milling Co.* [1897] 1 Ch. 617; *Connell v. Himalaya Bank* [1895] 18 All. 12 and *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407.

(17) [1895] 18 All. 12.

(18) *Hudson v. Dehradun Mussoorie E. Tramway Co.* (supra).

of moral turpitude. We have also to eliminate the elements of accident or inadvertence or honest error of judgment. The default must be the result of deliberation or intent or be the consequences of a reckless omission. 'Wilful default' therefore is indicative of some misconduct in the transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact whether the act or omission was or was not a breach of duty.' Then their Lordships cite the cases noted below (19).

**945. Duties of auditor :—**The auditor must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true, and that the books themselves show the company's true position. What is reasonable care must depend on the circumstances of each particular case (20). An auditor however is not bound to be suspicious when there are not circumstances to arouse his suspicion. He is bound only to exercise a reasonable amount of care and skill (21).

It is nothing to an auditor whether the business of the company is being conducted prudently or unprofitably or whether dividends are properly or improperly declared, provided he discharges his own duty which consists in examining the books of the company and satisfying himself that they show the true financial position of the company (22). If he fails in his duty, he will be jointly and severally liable with those who are responsible for the management of the company, although he is not guilty of any dishonesty (22).

But although it is not the duty of the auditors to consider whether the business of the company is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance sheet exhibits a correct view of the company's affairs and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company and must take reasonable care that what they certify as to the company's financial position is true, and except in very special cases it is their duty to place before the shareholders the necessary information and to indicate the means of acquiring it (23).

**946. Removal of auditor :—**There was no provision in the previous Act for removal of an auditor once appointed; but where the auditors neglected their duties by which loss had occurred to the company, the Court would not compel the directors to allow the auditors to proceed with their audit (24). See now this section.

**947.** Under the proviso to sub-s. (1) of s. 141 of the old Act the following had been declared as entitled to be appointed and to act as auditors: Members of—(1) the Institute of Chartered Accountants of England and Wales; (2) The Society of Incorporated Accountants and Auditors; (3) the Society of Accountants in Edinburgh; (4) the Institute of Accountants and Actuaries in Glasgow; (5) the Society of Accountants in Aberdeen and (6) the Institute of Chartered Accountants in Ireland (25).

**948. Defence of auditor :—**An irregularity in the appointment of an auditor may not avail him as a defence in a misfeasance proceeding (26).

(19) *Forder v. G. W. Ry. Co.* [1905] 2 K.B. 532; *Graham v. Belfast & N. C. Ry. Co.* [1901] 2 I.R. 13; *City Equitable Fire Insurance Co. (supra)*; *Queen v. Senior* [1899] 1 Q.B. 283; *Queen v. Downes* [1875] 1 Q.B.D. 25 and *Lewis v. G. W. Ry. Co.* [1895] 3 Q.B. 206.

(20) *London & General Bank No. 2* [1895] 2 Ch. 673.

(21) *Kingston Cotton Mill Co. No. 2* [1896] 2 Ch. 279.

(22) *Union Bank, Allahabad* [1925] A. 519, 47 All. 669, 23 A.L.J. 473.

(23) *London & General Bank No. 2* (supra).

(24) See *Republic of B. E. Syndicate* [1914] 1 Ch. 139.

(25) See *Gazette of India*, March 14, 1914.

(26) *Western C. B. Bakeries* [1897] 1 Ch. 617 (C.A.); see also *London & General Bank* [1895] 2 Ch. 673.

**949.** In England the appointment of an auditor under the corresponding section [sub-s. (2) of s. 132 of the English Act of 1929] is made by the Board of Trade. Where such an appointment was made by the Board of Trade on the supposition that an appointment of auditors made by the private company at the general meeting was invalid, but it was subsequently admitted by the plaintiffs that the appointment by the company was valid, it was held that the defendants were entitled to a declaration that the auditors appointed by the company should be the sole auditors (27).

**949A. Sub-s. (6). Casual vacancy :-** A casual vacancy is a temporary vacancy for a part of the year. It is not created by any deliberate omission on the part of the company to appoint an auditor in its annual general meeting (28).

**225. Provisions as to resolutions for appointing or removing auditors.—**(1) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(2) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(3) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so,—

(a) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representations by the company;

and if a copy of the representations is not sent as aforesaid because they were received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting :

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that

(27) *Scott v. Scott* [1943] 1 A.E.R. 582—per Lord Clauson J.

(28) *Council of Institute of Chartered Accountants v. Jnanendra* [1955] Ass. 8.

the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Court may order the company's costs on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

(4) Sub-sections (2) and (3) shall apply to a resolution to remove the first auditors or any of them under sub-section (5) of section 224 or to the removal of any auditor or auditors under sub-section (7) of that section, as they apply in relation to a resolution that a retiring auditor shall not be re-appointed.

This section is new. It corresponds to s. 160 of the English Act of 1948. Sub-s. (4) makes a consequential reference to sub-s. (7) of the previous section—*Notes on Clauses*.

## **226. Qualifications and disqualifications of auditors.—**

(1) A person shall not be qualified for appointment as auditor of a company unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (XXXVIII of 1949):

Provided that a firm whereof all the partners practising in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company, in which case any partner so practising may act in the name of the firm.

(2) (a) Notwithstanding anything contained in sub-section (1), but subject to the provisions of any rules made under clause (b), the holder of a certificate granted under a law in force in the whole or any portion of a Part B State immediately before the commencement of the Part B State (Laws) Act, 1951 (III of 1951), entitling him to act as an auditor of companies in that State or any portion thereof, shall be entitled to be appointed to act as an auditor of companies registered anywhere in that State.

(b) The Central Government may, by notification in the Official Gazette, make rules providing for the grant, renewal, suspension or cancellation of auditors' certificates to persons in Part B States for the purposes of clause (a), and prescribing conditions and restrictions for such grant, renewal, suspension or cancellation.

(3) None of the following persons shall be qualified for appointment as auditor of a company—

(a) a body corporate;

(b) an officer or employee of the company;

(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;

(d) a person who is indebted to the company for an amount exceeding one thousand rupees, or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding one thousand rupees;

(e) a person who is a director or member of a private company, or a partner of a firm, which is the managing agent or the secretaries and treasurers of the company;

(f) a person who is a director, or the holder of shares exceeding five per cent. in nominal value of the subscribed capital, of any body corporate which is the managing agent or the secretaries and treasurers, of the company:

Provided that any shares held by such person as nominee or trustee for any third person and in which the holder has no beneficial interest shall be excluded in computing the percentage of shares held by him for the purpose of this clause.

*Explanation.*—References in this sub-section to an officer or employee shall be construed as not including references to an auditor.

(4) A person shall also not be qualified for appointment as auditor of a company if he is, by virtue of sub-section (3), disqualified for appointment as auditor of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company.

(5) If an auditor becomes subject, after his appointment, to any of the disqualifications specified in sub-sections (3) and (4), he shall be deemed to have vacated his office as such.

See s. 144 of the previous Act. Sub-s. (1) (b) is based on s. 161 (1) (b) of the English Act of 1948. Such a provision is desirable especially in case where reciprocal arrangements are proposed by foreign countries on the basis of the provision contained in this sub-section—*Notes on Clauses*.

This was originally cl. 211 of the Bill in which alterations have been made by the Joint Committee with the following observations: "The original clause contained a provision to the effect that a company may appoint a person as auditor, with the approval of the Central Government, although he is not a Chartered Accountant or is not possessed of similar qualifications, if he has adequate knowledge and experience in the matter. The provision has been omitted.

"Sub-clause (2) has been inserted in this clause for the purpose of according a limited measure of recognition to certain classes of auditors who have been functioning in Part 'B' States. It reproduces the provisions of the existing Act. Sections

144 (2) and (2A), with very slight changes. The omission of these provisions were apparently an error" (*vide* J. C. R., para 85).

**949B. "Chartered Accountant"** :--This means a person who is a member of the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act, 1949 and who is in practice--See s. 2, cls. (b) and (c) of the said Act.

See notes to s. 224.

**949C. Sub-s. (2). Rules** :--For Rules made by the Central Government under this sub-section, see the Companies (Central Government's) General Rules and Forms, 1956 [towards the end under the heading "Restricted Auditors' Certificates (part B States) Rules, 1956"], printed as Appendix B.

**227. Powers and duties of auditors.**—(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, whether kept at the head office of the company or elsewhere, and shall be entitled to require from the officers of the company such information and explanations as the auditor may think necessary for the performance of his duties as auditor.

(2) The auditor shall make a report to the members of the company on the accounts examined by him, and on every balance sheet and profit and loss account and on every other document declared by this Act to be part of or annexed to the balance sheet or profit and loss account, which are laid before the company in general meeting during his tenure of office, and the report shall state whether, in his opinion and to the best of his information and according to the explanations given to him, the said accounts give the information required by this Act in the manner so required and give a true and fair view—

(i) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year ; and

(ii) in the case of the profit and loss account, of the profit or loss for its financial year.

(3) The auditor's report shall also state—

(a) whether he has obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purposes of his audit ;

(b) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books, and proper returns adequate for the purposes of his audit have been received from branches not visited by him ;

(c) whether the company's balance sheet and profit



and loss account dealt with by the report are in agreement with the books of account and returns.

(4) Where any of the matters referred to in clauses (i) and (ii) of sub-section (2) or in clauses (a), (b) and (c) of sub-section (3) is answered in the negative or with a qualification, the auditor's report shall state the reason for the answer.

(5) Where the company is one which is not required to disclose any matters by virtue of any provisions contained in this or in any other Act, if the balance sheet and the profit and loss account specify those provisions and if, in the opinion of the auditor and to the best of his information and according to the explanations given to him, they give the information required by this Act in the manner so required and, subject to the provisions aforesaid, give a true and a fair view, in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year, and in the case of the profit and loss account, of the profit or loss for its financial year, the auditor's report shall state that in his opinion and to the best of his information and according to the explanations given to him, the accounts of the company are properly drawn up so as to disclose the state of the company's affairs as at the date of its balance sheet and its profit or loss for its financial year ending on that date, so far as is required by the provisions of this or any other Act applicable to the company.

This section corresponds to s. 145 of the previous Act. See s. 162 of the English Act of 1948.

Sub-s. (4) is consequential on the provision taking power to exempt particular companies from making disclosure of specified portions of their accounts. In such cases, it is clear that the accounts should not be deemed to be untrue or unfair merely by reason of the withholding of the information which the company has been permitted to withhold—*Notes on Clauses*.

Some changes have been made in the section by the Joint Committee with the following remark : "The Committee consider that if the auditors' report answers in the negative or gives a qualified answer to the matters dealt with in sub-clauses (2) and (3) of this clause, the report should also state the reasons for such negative or qualified answers"—*Vide* new clause (4) (*Vide* J.C.R., para 86).

**950. Onus** :—Company auditors are bound to know or make themselves acquainted with the duties under the Companies Act for the time being in force and also under the company's articles of association (29). If the audited balance-sheet does not show the true financial condition of the company and damages are thereby caused, the onus is on the auditors to show that the damages are not the result of any breach of duty on their part (30).

(29) Kingston Cotton Mill No. 2 (supra) ; Republic of B. E. Syndicate (supra) at p. 171.

(30) Cuff v. London & County &c. Co. [1912] 1 Ch. 440.

**951. Auditor's responsibility :—**Auditors are *prima facie* responsible for *ultra vires* payments made on the faith of their balance sheet ; but whether and to what extent they are responsible for not discovering and calling attention to the illegality of payments made prior to the audit must depend on the special circumstances of each case (40).

An auditor who commits a breach of duty may be sued by the company in an action or may be proceeded against under s. 543 ; but an auditor who is merely called in to audit the accounts *pro hoc vice* is not an officer (31). An auditor may set up the statute of limitation (32).

It has been held in the undernoted case that an auditor is only bound to be reasonably cautious and careful and that it is not his duty to take stock (33). There are many matters in which the auditor must rely on the honesty and accuracy of others and he does not guarantee the discovery of fraud (33). Farwell, L. J. said that the business of an auditor "is to ascertain and state the true financial position of the company at the time of the audit and nothing more" (33).

**952. Closing of accounts :—**The auditing of a company's accounts does, in the absence of proof of fraud or mistake in connection with the audit, close the accounts as between the shareholders and the directorate ; but it does not preclude the company from calling upon its agents for rendition (34).

**953. Auditor's report. On construction of articles :—**The auditor's duty to make a report to the members is confined to forwarding their report to the secretary of the company leaving the secretary or the directors to perform the duties which the statute imposes of convening a general meeting to consider the report (35). It is not enough for the auditors merely to report that the balance-sheet does not exhibit a true view of the accounts. They must report generally on the state of the accounts ; their duty is to call attention to what is wrong (36). Lord Lindley specified the duties of an auditor in a case (37), where the auditors and the directors were held to be jointly and severally liable to repay the amount of dividend improperly declared and paid. A report obtained by a company from chartered accountants on the interpretation of one of the articles of association of the company involving the duty of the directors in administering its affairs is a report obtained on behalf of all the shareholders and is not privileged if ordered before, even if received after, the commencement of legal proceedings by certain shareholders against the company to determine a dispute on the construction of the articles (38).

**954. Directors are not bound to supervise auditor's work :—**Directors are entitled to presume that the auditors, like other officers of the company, are doing their duty and are not bound to supervise or test the auditor's work (39). Auditors are *prima facie* responsible for *ultra vires* payments made on the faith of their balance-sheet ; but whether and to what extent they are responsible for not discovering and calling attention to the illegality of payment depends on the special circumstances of each case (40).

(31) *Western C. B. Bakeries* [1897] 1 Ch. 617 (C.A.).

(32) *Leeds Estate, Building & Co. v. Shepherd* [1887] 36 Ch. D. 787.

(33) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407. See also the judgment of P. B. Chakravarti, C. J. in *Deputy Secretary v. Das Gupta* [1955] 60 C.W.N. 124.

(34) *Ramchand v. Imperial Oil & Co.* [1917] 86 P.R., 42 L.C. 375.

(35) *Allen Craig & Co. (London)* [1934] Ch. 483.

(36) *Nefton v. Birmingham Small Arms Co.* [1906] 2 Ch. 378.

(37) *London & General Bank* [1895] 2 Ch. 673.

(38) *W. Dennis & Sons, Ltd. v. West Norfolk F. & M. C. Co-operative Co.* [1943] 1 Ch. 220.

(39) *Dovey v. Cory* [1901] A.C. 477.

(40) *Republic of B. E. Syndicate* [1914] 1 Ch. 139.

**955. Agents for shareholders :—**Auditors are agents for the shareholders, but the latter are not necessarily bound by notice of every thing of which notice is given to the former (41).

**956. Auditor's duty:—**It is the duty of the auditor to give information to the shareholders and not merely the means of information. He must communicate facts so that on these facts the shareholders may judge the position for themselves and not merely throw out hints which might put the shareholders on enquiry. When the facts are such as to cause a doubt in the mind of the auditor as to the accuracy of certain entries in the balance-sheet or they are such that, if disclosed they would show the balance-sheet in a different light, those facts must be conveyed to the shareholders (42). The auditor's duty is to make a full, careful and truthful report, in default of which he must be held to have failed in the discharge of his obligations (42). S. 21 (3) of the Chartered Accountants Act, 1949 gives the High Court an unqualified liberty to pass any order it likes, even if the act or omission found against a Chartered Accountant may be such as, under the provision of the Act itself renders him unfit to be a member of the Institute (42).

It is the duty of the auditor not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy and ascertain that it contained the particulars specified in the articles of association and was properly drawn up so as to contain a true and correct representation of the company's state of affairs (43). If improper payments by the directors are the natural and immediate consequence of breach of duty on the part of the management and the auditors, they are liable in damages to the amount so paid (44).

The duty of an auditor is not confined to ascertaining whether there are vouchers for each item of the accounts, but extends to investigating whether the payments represented by the vouchers are authorized, or are without authority, or otherwise illegal or improper (45). Where payment of commission for placing shares is authorized by the memorandum of association and by a resolution of the directors and not by the articles, the auditors ought to point that out (46).

An auditor is not justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left, whenever such personal inspection is practicable. A stock broker of a company, however respectable and responsible he may be, is not the proper person to have the custody of its securities except on such occasions when for short periods securities must of necessity be left with him; but immediately such necessity ceases the securities should be lodged in the company's strong room or with its bank or placed in other proper and usual safe keeping (47).

Whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or if his requirement is not complied with, to report the fact to the shareholders and this whether he can or cannot make a personal inspection (47).

The measure of the auditor's responsibility depends upon the terms of his engagement. There may be special contract defining duties and liabilities of the

(41) *Spackman v. Evans* [1868] L.R. 3 H.L. 171 at pp. 196 & 235.

(42) *Deputy Secretary v. Das Gupta* [1955] 50 C.W.N. 124.

(43) *Leeds Estate, Building & Co. v. Shepherd*, (infra).

(44) *Leeds Estate, Building & Co. v. Shepherd* [1887] 36 Ch. D. 787; *London & General Bank* [1895] 2 Ch. 673, 682, 692; *Kingston Cotton Mill No. 2* [1896] 2 Ch. 270.

(45) *Thomas v. Corp'n. of Devonport* [1900] 1 Q.B. 16.

(46) *Republic of B. E. Syndicate* [1914] 1 Ch. 139.

(47) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407.

auditors. If there is such a contract, then that contract governs the question. The articles will however be looked at, if there is no special agreement, because the auditors will presumably have taken their duties upon the terms, *inter alia*, set out in the articles. That is not to say that the auditors can set aside a statutory obligation. No agreement or articles of association can remove an imperative or statutory duty (47).

This section does not lay down a rigid code. The duty imposed on auditors by it is not absolute but depends upon the information given and explanations furnished to them, so that there is abundant scope for discretion. The onus lies upon the auditors who would not be excused for total omission to comply with any of the requirements of the section, or for any consequences of deliberate or recklessly indifferent failure to ask for information on matters which call for further explanation (47).

Auditors should not be content with a certificate that securities are in the possession of a particular company, firm or person, unless the latter are trustworthy or respectable and further are such as in the ordinary course of business keep securities for their customers. In all these cases the auditors must use their judgment. Whether an auditor did in fact entertain the opinion he reported is a question of fact (48).

As to the duty of an auditor in respect of branch offices of a banking company see the under-noted case (49).

**957. Articles :—**It is the duty of auditors to make themselves familiar with obligations imposed upon them by the company's articles. An article exempting auditors from liability for losses not happening by or through their own wilful neglect or default is valid and effective (50). But if any loss arises to the company from neglect of duty on the part of the auditors, they may be held personally liable (51).

**958. Taking stock :—**Although it is not the duty of accountants to take stock in auditing the accounts, they may well call for explanations of particular items in the stock-sheet (52).

As to the duties and liabilities of auditors generally see the cases noted below (53).

**959. Articles where ultra vires :—**A company has no power to make regulations precluding its auditors from availing themselves of all the information to which they are entitled as material for their report to be made to the shareholders as to the true state of the company's affairs. If the company does so, the regulations are *ultra vires* (54).

An auditor will be ordered to deliver up books and papers to the liquidator without prejudice to his own lien (55).

## 228. Audit of accounts of branch office of company.—

(1) Where a company has a branch office, the accounts of that office shall, unless the company in general meeting decides

(48) City Equitable Fire Insurance Co., (supra).

(49) Deputy Secretary v. Das Gupta, supra. See the next section.

(50) Kingston Cotton Mill No. 2 (supra). But see s. 201.

(51) Leeds Estate, Building &c. Co. (supra); London & General Bank (supra).

(52) Mead v. Ball Baker & Co. [1912] 28 T.L.R. 81 (C.A.).

(53) City Equitable Fire Insurance Co. (supra); Republic of B. E. Syndicate [1914]

1 Ch. 139.

(54) Newton v. Birmingham Small Arms Co. [1906] 2 Ch. 378.

(55) Findlay v. Waddell [1910] S.C. 670.

otherwise, be audited by a person qualified for appointment as auditor of the company under section 226, or where the branch office is situate in a country outside India, either by a person qualified as aforesaid or by an accountant duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.

(2) Where the accounts of any branch office are not so audited, the company's auditor—

(a) shall be entitled to visit the branch office, if he deems it necessary to do so for the performance of his duties as auditor, and

(b) shall have a right of access at all times to the books and accounts and vouchers of the company maintained at the branch office :

Provided that in the case of a banking company having a branch office outside India, it shall be sufficient if the auditor is allowed access to such copies of, and extracts from, the books and accounts of the branch as have been transmitted to the principal office of the company in India.

This section is new. It is based on sub-s. (3) of s. 145B of the C. L. C.'s redraft at page 425 of their Report—*Notes on Clauses*.

**229. Signature of audit report etc.**—Only the person appointed as auditor of the company, or where a firm is so appointed in pursuance of the proviso to sub-section (1) of section 226, only a partner in the firm practising in India, may sign the auditor's report, or sign or authenticate any other document of the company required by law to be signed or authenticated by the auditor.

This section also is new. It is based on the second Proviso to s. 145A (1) of the C. L. C.'s redraft at p. 423 of their Report—*Notes on Clauses*.

**230. Reading and inspection of auditor's report.**—The auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

This section corresponds to the last portion of sub-s. (2) of s. 131 of the previous Act. It is based on s. 145B (5) of the C. L. C.'s redraft, and s. 162 (2) of the English Act of 1948—*Notes on Clauses*.

See notes to s. 227.

**231. Right of auditor to attend general meeting.**—All notices of, and other communications relating to, any general meeting of a company which any member of the company is entitled to have sent to him shall also be forwarded to the auditor of the company; and the auditor shall be entitled to attend any general meeting and to be heard at any general meeting which he attends on any part of the business which concerns him as auditor.

This section corresponds to sub-s. (4) of s. 145 of the previous Act. It is based on sub-s. (4) of s. 145B of the C. L. C.'s redraft and s. 162 (3) of the English Act of 1948—*Notes on Clauses*.

See notes to s. 227.

**232. Penalty for non-compliance with sections 225 to 231.**—If default is made by a company in complying with any of the provisions contained in sections 225 to 231, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

This section generalises the provision in sub-s. (7) of s. 145B of the C. L. C.'s redraft—*Notes on Clauses*.

See notes to ss. 224 and 227.

**233. Penalty for non-compliance by auditor with sections 227 and 229.**—If any auditor's report is made, or any document of the company is signed or authenticated, otherwise than in conformity with the requirements of sections 227 and 229, the auditor concerned, and the person, if any, other than the auditor who signs the report or signs or authenticates the document, shall, if the default is wilful, be punishable with fine which may extend to one thousand rupees.

This section generalises non-compliance by the auditor of the provisions relating to them—*Notes on Clauses*.

*Power of Registrar to call for information etc.*

**234. Power of Registrar to call for information or explanation.**—(1) Where, on perusing any document which a company is required to submit to him under this Act, the Registrar is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the

document to furnish in writing such information or explanation, within such time as he may specify in the order.

(2) On receipt by the company of an order under sub-section (1), it shall be the duty of the company, and of all persons who are officers of the company, to furnish such information or explanation to the best of their power.

(3) On receipt of a copy of an order under sub-section (1), it shall also be the duty of every person who has been an officer of the company to furnish such information or explanation to the best of his power.

(4) If the company, or any such person as is referred to in sub-section (2) or (3), refuses or neglects to furnish any such information or explanation,—

(a) the company, and each such person, shall be punishable with fine which may extend to fifty rupees in respect of each offence ; and

(b) the Court may, on the application of the Registrar and after notice to the company, make an order on the company for production of such documents as, in the opinion of the Court, may reasonably be required by the Registrar for the purpose referred to in sub-section (1) and allow the Registrar inspection thereof on such terms and conditions as it thinks fit.

(5) On receipt of any document containing such information or explanation, the Registrar may annex it to the original document submitted to him ; and any document so annexed shall be subject to the like provisions as to inspection, the taking of extracts, and the furnishing of copies, as the original document is subject.

(6) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the Registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matter to which it purports to relate, the Registrar shall report in writing the circumstances of the case to the Central Government.

(7) If it is represented to the Registrar on materials placed before him by any contributory or creditor or any other person interested that the business of a company is being carried on in fraud of its creditors or of persons dealing with the company or otherwise for a fraudulent or unlawful

purpose, he may, after giving the company an opportunity of being heard, by a written order, call on the company to furnish in writing any information or explanation on matters specified in the order, within such time as he may specify therein ; and the provisions of sub-sections (2), (3), (4) and (6) of this section shall apply to such order.

If upon inquiry the Registrar is satisfied that any representation on which he took action under this sub-section was frivolous or vexatious, he shall disclose the identity of his informant to the company.

(8) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator, or a foreign company within the meaning of section 591, is required to file under this Act.

This section is based on s. 137 of the previous Act. It was considered desirable to retain this provision in spite of the considerable amplifications of the provisions relating to investigation contained in sections 220 (now s. 235) *et seq.*—*Notes on Clauses.*

960. Scope :—The subject matter of s. 137 of the previous Act was an investigation rather than a prosecution. Sub-s. (6) thereof was confined to cases in which there were allegations of fraud, and many prosecutions under the Act would have been entirely outside it. The intention of the section was to facilitate the investigation of the affairs of the company and it had no reference to actual proceedings in Court (56). It was not possible to read into this section any prohibition of private prosecution (56). S. 137 of the previous Act had no relation to a prosecution for an offence under s. 282 of the old Act (57).

### *Investigation*

**235. Investigation of affairs of company on application by members or report by Registrar.**—The Central Government may appoint one or more competent persons as inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct,—

(a) in the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the total voting power therein ;

(b) in the case of a company not having a share capital, on the application of not less than one-fifth in

(56) *Surendra v. Kalipada* [1940] C. 232, 44 C.W.N. 454, [1940] 1 Cal. 575.

(57) *Emperor v. Vishwanath* [1942] S. 9.



number of the persons on the company's register of members ;

(c) in the case of any company, on a report by the Registrar under sub-section (6), or sub-section (7) read with sub-section (6), of section 234.

SS. 235 to 251 are, broadly speaking, based on the provisions contained in ss. 164 to 175 of the English Act of 1948. The necessity for the changes has been fully explained in paras 190 to 197 of the C. I. C. R. and a detailed summary of the changes suggested will be found at pages 304 to 308 of the Report—*Notes on Clauses*.

S. 235 is based on s. 138 of the previous Act and s. 164 (1) of the English Act of 1948. Cl. (c) is based on s. 138 (iv) of the previous Act, and is consequential on the retention of s. 137 of that Act—*ibid*.

At the end of cl. (a) of this section the words "total voting power therein" have been substituted for the words "shares issued" by the Lok Sabha.

S. 646 *post* provides that nothing in the present Act shall affect the operation of s. 138 of the previous Act as respects inspectors or the continuation of an inspection begun by the inspectors appointed before the commencement of the present Act ; and that the provisions of the present Act shall apply to or in relation to a report of inspectors appointed under the said s. 138 as they apply to or in relation to a report of inspectors appointed under s. 135 or s. 137 of the present Act.

S. 138 of the previous Act was as follows:—

*Investigation of affairs of company by inspectors.*

"138. The Central Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct—

- (i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued ;
- (ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued ;
- (iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members ;
- (iv) in the case of any company, on a report by the Registrar under section 137, sub-section (5)."

Sub-s. (5) mentioned in cl. (iv) of s. 138 of the previous Act corresponds to sub-s. (6) of s. 234 of the present Act.

**Central Government :—**For definition see notes to s. 10 *ante*.

**961. Expenses of investigation :—**The Local Government on a report from the Registrar under s. 137 (5) of the old Act took action and passed an order directing that the expenses of the investigation amounting to Rs. 100 should be paid by the bank. The Local Government itself paid the amount to the inspector and, when subsequently the bank went into a voluntary liquidation, submitted its claims to the voluntary liquidator who registered it as a preferential claim. But the official liquidator appointed on compulsory winding up refused to recognize the claim as a preferential claim. The Lahore High Court held that the claim could not be recognized as a preferential claim (58).

(58) Secretary of State *v.* Punjab Industrial Bank [1931] L. 351, 12 Lah. 678, 134 I.C. 200.

**962. Inspector is entitled to assistance :—**An inspector appointed under this section to investigate the affairs of a company is entitled to the assistance of any person whom he may reasonably require to be present at the investigation to enable him to prepare his report. An officer or agent of the company summoned to such an investigation is not entitled to refuse to answer questions put to him by the inspector on the ground that the latter has brought in a shorthand writer to take a note of the evidence, and if he so refuse, he is in the same position as a person who has committed a contempt of Court (59).

**963. Private prosecution :—**Section 138 of the old Act did not bar a prosecution upon a private complaint of an offence under s. 282 thereof (60). See now s. 621.

**963A. Rules for application :—**For Rules relating to an application under this section prepared by the Central Government, see Rule 8 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**236. Application by members to be supported by evidence and power to call for security.—**An application by members of a company under clause (a) or (b) of section 235 shall be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reason for requiring the investigation ; and the Central Government may, before appointing an inspector, require the applicants to give security, for such amount not exceeding one thousand rupees as it may think fit, for payment of the costs of the investigation.

This section corresponds to s. 139 of the previous Act and s. 164(2) of the English Act of 1948—*Notes on Clauses.*

**237. Investigation of company's affairs in other cases.—**Without prejudice to its powers under section 235, the Central Government—

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if—

(i) the company, by special resolution, or

(ii) the Court, by order,

declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government ; and

(b) may do so if, in the opinion of the Central Government, there are circumstances suggesting—

(i) that the business of the company is being

(59) *Gaumont British Picture Corpn.* [1940] Ch. 506.

(60) *Emperor v. Vishwanath* [1942] S. 9.

conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose ; or

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager, of the company.

This section is new. It corresponds to s. 165 of the English Act of 1948—*Notes on Clauses*.

Compare ss. 138 and 142 of the previous Act.

This was originally cl. 222 of the Bill in which alteration has been made by the Joint Committee with the following observation: "The Committee think that, as recommended by the Report of the Company Law Committee a suitable provision should be inserted in the Bill to provide that the Government should have power to appoint inspectors in case there has been any failure on the part of the company to give necessary information relating to the calculation of the commission payable to directors, managing agents, secretaries and treasurers or managers. Sub-clause (b) (iii) of clause 236 (now s. 237) has therefore been suitably amplified" (*vide* J.C.R., para 87).

Cl. (b) (i) of this section has been altered a little by the Lok Sabha inserting the word "members".

**238. Firm, body corporate or association not to be appointed as inspector.**—No firm, body corporate or other association shall be appointed as an inspector under section 235 or 237.

This new section has been inserted by the Joint Committee with the following observation: "This new clause provides that no firm, body corporate or other association can be appointed as inspectors by the Government" (*vide* J. C. R., para 88).

**239. Power of inspectors to carry investigation into affairs of related companies or of managing agent or associate.**—(1) If an inspector appointed under section 235 or 237 to investigate the affairs of a company thinks it

necessary for the purposes of his investigation to investigate also the affairs of—

(a) any other body corporate which is, or has at any relevant time been, the company's subsidiary or holding company, or a subsidiary of its holding company, or a holding company of its subsidiary ;

(b) any other body corporate which is, or has at any relevant time been, managed—

(i) by any person as managing agent or as secretaries and treasurers who is, or was at the relevant time, either the managing agent or the secretaries and treasurers of the company ;

(ii) by any person who is, or was at the relevant time, an associate of the managing agent or secretaries and treasurers of the company ; or

(iii) by any person of whom the managing agent or secretaries and treasurers of the company is, or was at the relevant time, an associate ;

(c) any other body corporate which is, or has at any relevant time been, managed by the company ; or

(d) any person who is, or has at any relevant time been, the company's managing agent or secretaries and treasurers or an associate of such managing agent or secretaries and treasurers,

the inspector shall, subject to the provisions of sub-section (2), have power so to do, and shall report on the affairs of the other body corporate or of the managing agent, secretaries and treasurers or associate of the managing agent or secretaries and treasurers, so far as he thinks the results of his investigation thereof are relevant to the investigation of the affairs of the first-mentioned company.

(2) In the case of any body corporate or person referred to in clause (b) (ii), (b) (iii), (c), or (d) of sub-section (1), the inspector shall not exercise his power of investigating into, and reporting on, its or his affairs without first having obtained the prior approval of the Central Government thereto.

This section also is new. It corresponds to s. 166 of the English Act of 1948. Having regard to the managing agency system which prevails in India, clauses (b), (c) and (d) have been added to the provision which occurs in the English Act—*Notes on Clauses*.

Certain alterations of importance have been made in this section by the Joint Committee without any remarks. Sub-s. 1 (b) (i) has been amplified and the new sub-s. (2) has been inserted by the Joint Committee.

## 240. Production of documents and evidence.—(1)

It shall be the duty of all officers and agents of the company, and where the company is or was managed by a managing agent or secretaries and treasurers, of all officers and agents of the managing agent or secretaries and treasurers, and where the affairs of any other body corporate, or of a managing agent or secretaries and treasurers, or of an associate of a managing agent or secretaries and treasurers, are investigated by virtue of section 239, of all officers and agents of such body corporate, managing agent, secretaries and treasurers, or associate, and where such managing agent, secretaries and treasurers or associate is or was a firm, of all partners in the firm—

(a) to produce to an inspector all books and papers of, or relating to, the company or, as the case may be, of or relating to the other body corporate, managing agent, secretaries, and treasurers or associate, which are in their custody or power ; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) An inspector may examine on oath any of the persons referred to in sub-section (1), in relation to the affairs of the company, other body corporate, managing agent, secretaries and treasurers or associate, as the case may be ; and may administer an oath accordingly.

(3) If any such person refuses—

(a) to produce to an inspector any book or paper which it is his duty under sub-section (1) to produce ; or

(b) to answer any question which is put to him by an inspector in pursuance of sub-section (2),

the inspector may certify the refusal under his hand to the Court ; and the Court may thereupon inquire into the case ; and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, punish the offender as if he had been guilty of contempt of the Court.

(4) If an inspector thinks it necessary for the purpose of his investigation that a person whom he has no power to examine on oath should be so examined, he may apply to the Court and the Court may, if it sees fit, order that person to

attend and be examined on oath before it on any matter relevant to the investigation, and on any such examination—

(a) the inspector may take part therein either personally or by a legal practitioner ;

(b) the Court may put such questions to the person examined as the Court thinks fit ;

(c) the person examined shall answer all such questions as the Court may put or allow to be put to him, but may at his own cost employ a legal practitioner, who shall be at liberty to put to such person such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him :

Provided that, notwithstanding anything in clause (c), the Court may allow the person examined such costs as in its discretion it may think fit, and any costs so allowed shall be treated as part of the expenses of the investigation.

(5) Notes of any examination under sub-section (2) or (4) shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(6) In this section—

(a) the expression “officers”, in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate ;

(b) the expression “agent”, in relation to any company, body corporate or person, means any one acting or purporting to act for or on behalf of such company, body corporate or person, and includes the bankers and legal advisers of, and persons employed as auditors by, such company, body corporate or person ; and

(c) any reference to officers, agents or partners shall be construed as a reference to past as well as present officers, agents or partners, as the case may be.

This section is based on s. 140 of the previous Act and s. 167 of the English Act of 1948 which has been embodied here with consequential alterations due to the prevalence of the managing agency system in this country—*Notes on Clauses*.

The Lok Sabha has inserted in sub-s. (6) of this section the new cl. (a) and altered the numbering of the original cls. (a) and (b).

**964.** The High Court will not grant a prohibition against the holding of the examination under this section (61).

(61) See *Grosvenor &c. Hotel Co.* [1897] 76 L.T. 337.

**965. SUB-S (3) :—**The refusal on the part of the managing agent or director to produce the books and accounts of the company will not render him liable to conviction under this sub-section, if it is found that the inspector has not been validly appointed (6a). An inspector appointed by the Provincial Government subsequent to the transfer of functions of that Government under s. 138 of the old Act to the Central Government and before the entrustment of those functions to the Provincial Government by the Governor General could not be held to be validly appointed (6a). Where the appointment of an inspector was invalid by reason of the provisions of para 8 (2), India and Burma (Transitory Provisions) Order, 1937, conviction under this sub-section for refusal to produce books and documents before such inspector could not be sustained (6a).

**241. Inspectors' report.—**(1) The inspectors may, and if so directed by the Central Government shall, make interim reports to that Government, and on the conclusion of the investigation, shall make a final report to the Central Government.

Any such report shall be written or printed, as the Central Government may direct.

(2) The Central Government—

(a) shall forward a copy of any report made by the inspectors to the company at its registered office, and also to any body corporate, managing agent, secretaries and treasurers or associate dealt with in the report by virtue of section 239 ;

(b) may, if it thinks fit, furnish a copy thereof, on request and on payment of the prescribed fee, to any person—

(i) who is a member of the company or other body corporate (including a managing agent, secretaries and treasurers, or an associate of a managing agent or secretaries and treasurers, where such managing agent, secretaries and treasurers or associate is a body corporate) dealt with in the report by virtue of section 239 ;

(ii) who is a partner in the firm, where such managing agent, secretaries and treasurers or associate is a firm ; or

(iii) whose interests as a creditor of the company, other body corporate, managing agent, secretaries and treasurers or associate aforesaid appear to the Central Government to be affected ;

(6a) *Sri Minakshi Mills, Ltd.* [1939] M. 589, [1939] M.W.N. 743, 183 I.C. 762, 40 Cr. L.J. 895.

(c) shall, where the inspectors are appointed under clause (a) or (b) of section 235, furnish, at the request of the applicants for the investigation, a copy of the report to them ;

(d) shall, where the inspectors are appointed under section 237 in pursuance of an order of the Court, furnish a copy of the report to the Court ; and

(e) may also cause the report to be published.

This section corresponds to s. 141 of the previous Act and embodies s. 168 of the English Act of 1948 with some drafting changes—*Notes on Clauses*.

This was originally cl. 225 of the Bill, proviso to sub-s. (2) whereof has been omitted by the Joint Committee with the following observation: "Under the proviso . . . the Government need not furnish to the company the information contained in the Report of the inspector. This proviso has been omitted as harmful and unnecessary . It does not occur in the corresponding provision of the English Act" (*vide* J. C. R., para 89).

**965A. Sub-s (2) (b). Copy—fee for:—**As to the fee for furnishing a copy of the Inspector's report, see Rule 9 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**242. Prosecution.—**(1) If, from any report made under section 241, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate, managing agent, secretaries and treasurers, or associate of a managing agent or secretaries and treasurers, whose affairs have been investigated by virtue of section 239, been guilty of any offence for which he is criminally liable, the Central Government may, after taking such legal advice as it thinks fit, prosecute such person for the offence ; and it shall be the duty of all officers and agents of the company, body corporate managing agent, secretaries and treasurers, or associate, as the case may be, (other than the accused in the proceedings), to give the Central Government all assistance in connection with the prosecution which they are reasonably able to give.

(2) Sub-section (6) of section 240 shall apply for the purposes of this section, as it applies for the purposes of that section.

This section corresponds to s. 141A of the previous Act. It embodies s. 169 (1) and (2) of the English Act of 1948 with some consequential changes. The question whether prosecution proceedings should be instituted will be decided by the Central Government after taking legal advice—*Notes on Clauses*.

From the heading of this section the words "on inspectors' report" after the word "Prosecution" have been dropped by the Lok Sabha.



**Central Government** :—For definition see notes to s. 10.

**966. Prosecution by private individuals** :—There was nothing in the actual terms of the old s. 141A to justify an inference that the intention of the legislature was that prosecutions by private individuals should not be allowed. The section cast a duty on the Advocate General or the Public Prosecutor, to cause proceedings to be instituted in certain circumstances. It also cast a duty upon the officers of the company to render assistance in connection with such prosecution. The terms of the section were quite different from those, for example, of ss. 196 and 198 of the Code of Criminal Procedure by which a bar is placed upon the jurisdiction of the Criminal Courts (63). Now see s. 621.

For meaning of the word "prosecution", see *Brojendra v. Emperor* (64). The words "of any offence in relation to the company for which he is criminally liable" in sub-s. (1) of the old s. 141A meant not only criminally liable under the Act, but criminally liable under the Penal Code as well (65).

**243. Application for winding up of company or an order under section 397 or 398.**—If any such company or other body corporate, or any such managing agent, secretaries and treasurers, or associate, being a body corporate, is liable to be wound up under this Act and it appears to the Central Government from any such report as aforesaid that it is expedient so to do by reason of any such circumstances as are referred to in sub-clause (i) or (ii) of clause (b) of section 237, the Central Government may, unless the company, body corporate, managing agent, secretaries and treasurers or associate is already being wound up by the Court, cause to be presented to the Court by any person authorised by the Central Government in this behalf—

(a) a petition for the winding up of the company, body corporate, managing agent, secretaries and treasurers, or associate, on the ground that it is just and equitable that it should be wound up ;

(b) an application for an order under section 397 or 398 ; or

(c) both a petition and an application as aforesaid.

This section is new. It corresponds to s. 169 (3) of the English Act of 1948 with consequential changes—*Notes on Clauses*.

In the heading of this section the words after "company" have been substituted by the Lok Sabha for the words "etc. on inspectors' report".

(63) *Surendra v. Kalipada*, supra ; *Emperor v. Vishwanath*, supra. See also *Muthuveeran v. Mottayan* [1942] M. 283, [1942] 1 M.L.J. 230, [1942] M.W.N. 121, 202 I.C. 28.

(64) [1903] 7 C.W.N. 883.

(65) *Emperor v. Vishwanath*, supra.

**244. Proceedings for recovery of damages or property.**—(1) If from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated in pursuance of clause (a), (b) or (c) of section 239,—

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate ; or

(b) for the recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained ;

the Central Government may itself bring proceedings for that purpose in the name of such company or body corporate.

(2) The Central Government shall indemnify such company or body corporate against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (1).

This section also is new. It corresponds to sub-ss. (4) and (5) of s. 169 of the English Act of 1948—*Notes on Clauses*.

In the heading of this section the Lok Sabha has dropped the words "on inspectors' report" after the word "property".

**245. Expenses of investigation.**—(1) The expenses of and incidental to an investigation by an inspector appointed by the Central Government under section 235 or 237 shall be defrayed in the first instance by the Central Government ; but the following persons shall, to the extent mentioned below, be liable to reimburse the Central Government in respect of such expenses :—

(a) any person who is convicted on a prosecution instituted in pursuance of section 242, or who is ordered to pay damages or restore any property in proceedings brought by virtue of section 244, may, in the same proceedings, be ordered to pay the said expenses to such extent as may be specified by the Court convicting such person, or ordering him to pay such damages or restore such property, as the case may be ;

(b) any company or body corporate in whose name proceedings are brought as aforesaid shall be liable, to the

extent of the amount or value of any sums or property recovered by it as a result of the proceedings ; and

(c) unless, as a result of the investigation, a prosecution is instituted in pursuance of section 242,—

(i) any company, body corporate, managing agent, secretaries and treasurers or associate dealt with by the report, where the inspector was appointed under clause (a) or (b) of section 235 or clause (a) of section 237, shall be liable to reimburse the Central Government in respect of the whole of the expenses, unless, and except in so far as, the Central Government otherwise directs ; and

(ii) the applicants for the investigation, where the inspector was appointed under clause (a) or (b) of section 235, shall be liable to such extent, if any, as the Central Government may direct.

(2) Any amount for which a company or body corporate is liable by virtue of clause (b) of sub-section (1) shall be a first charge on the sums or property mentioned in that clause.

(3) The report of an inspector appointed under clause (c) of section 235 or clause (b) of section 237, may if he thinks fit, and shall if the Central Government so directs, include a recommendation as to the directions, if any, which he thinks appropriate, in the light of his investigation, to be given under clause (c) of sub-section (1).

(4) For the purposes of this section, any costs or expenses incurred by the Central Government in or in connection with proceedings brought by virtue of section 244 (including expenses incurred by virtue of sub-section (2) thereof) shall be treated as expenses of the investigation giving rise to the proceedings.

(5) (a) Any liability to reimburse the Central Government imposed by clauses (a) and (b) of sub-section (1) shall, subject to satisfaction of the right of the Central Government to reimbursement, be a liability also to indemnify all persons against liability under clause (c) of that sub-section.

(b) Any such liability imposed by the said clause (a) shall, subject as aforesaid, be a liability also to indemnify all persons against liability under the said clause (b).

(c) Any person liable under the said clause (a) or (b) or sub-clause (i) or (ii) of the said clause (c) shall be entitled to contribution from any other persons liable under the same clause or sub-clause, as the case may be, according to the amount of their respective liabilities thereunder.

(6) In so far as the expenses to be defrayed by the Central Government under this section are not recovered thereunder, they shall be paid out of moneys provided by Parliament.

See sub-s. (9) of s. 141 of the previous Act. This section embodies s. 170 of the English Act of 1948 with a few drafting alterations—*Notes on Clauses*.

In the heading of this section the words "Recovery of" before "Expenses" and the words "etc." at the end have been omitted by the Lok Sabha.

**246. Inspectors' report to be evidence.**—A copy of any report of any inspector or inspectors appointed under section 235 or 237 authenticated in such manner, if any, as may be prescribed, shall be admissible in any legal proceeding as evidence of the opinion of the inspector or inspectors in relation to any matter contained in the report.

This section corresponds to s. 143 of the previous Act and s. 171 of the English Act of 1948—*Notes on Clauses*.

**966A. Authentication of copy of report** :—As to how a copy of the inspector's report is to be authenticated, see Rule 10 of the Companies (Central Government's) General Rules and Forms—printed in App. B.

**247. Investigation of ownership of company.**—(1) Where it appears to the Central Government that there is good reason so to do, it may appoint one or more inspectors to investigate and report on the membership of any company and other matters relating to the company, for the purpose of determining the true persons—

(a) who are or have been financially interested in the success or failure, whether real or apparent, of the company ; or

(b) who are or have been able to control or materially to influence the policy of the company.

(2) When appointing an inspector under sub-section (1), the Central Government may define the scope of his investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may

limit the investigation to matters connected with particular shares or debentures.

(3) Subject to the terms of an inspector's appointment, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant to the purposes of his investigation.

(4) Subject as aforesaid, the powers of the inspector shall also extend, where the company has or at any time had a managing agent or secretaries and treasurers,—

(a) in case such managing agent or secretaries and treasurers are or were a body corporate, to the investigation of the ownership of the shares of such body corporate, and of who the persons are or were who control or manage or controlled or managed its affairs;

(b) in case such managing agent or secretaries and treasurers, are or were a firm, to the investigation of who the persons are or were who control or manage or controlled or managed its affairs as partners in the firm or otherwise and of the respective interests therein of the partners ; and

(c) in all cases, to the investigation of who the persons are or were who are or were entitled to any share of, or any amount forming part of, the remuneration of such managing agent or secretaries and treasurers.

(5) For the purposes of any investigation under this section, sections 239, 240 and 241 shall apply with the necessary modifications of references to the affairs of the company or to those of any other body corporate or of any managing agent, secretaries and treasurers, or associate :

Provided that the said sections shall apply in relation to all persons (including persons concerned only on behalf of others) who are or have been, or whom the inspector has reasonable cause to believe to be or to have been,—

(i) financially interested in the success or failure, or the apparent success or failure, of the company, or of any other body corporate, managing agent, secretaries and treasurers or associate whose membership or constitution is investigated with that of the company ; or

(ii) able to control or materially to influence the policy of such company, body corporate, managing agent, secretaries and treasurers or associate ;

as they apply in relation to officers and agents of the company, of the other body corporate, or of the managing agent, secretaries and treasurers or associate, as the case may be :

Provided further that the Central Government shall not be bound to furnish the company or any other person with a copy of any report by an inspector appointed under this section or with a complete copy thereof, if it is of opinion that there is good reason for not divulging the contents of the report or of parts thereof ; but in such a case, the Central Government shall cause to be kept by the Registrar a copy of any such report, or as the case may be, of the parts thereof, as respects which it is not of that opinion.

(6) The expenses of any investigation under this section shall be defrayed by the Central Government out of moneys provided by Parliament, unless the Central Government directs that the expenses or any part thereof should be paid by the persons on whose application the investigation was ordered.

This section is new. It corresponds to s. 172 of the English Act of 1948—*Notes on Clauses*.

This was originally cl. 231 of the Bill in which alteration has been made by the Joint Committee with the following observation: "A provision on the lines of the proviso which has been omitted from clause 240 referred to in the preceding paragraph, has been added to this clause. The provision is necessary in this case. A similar provision exists in the corresponding section of the English Act, viz. section 172 (5) (b). It has also been provided that in such cases the Government may direct the Registrar to keep such parts, if any, of the report as are not of a confidential nature" (*vide* J. C. R., para 90).

The new heading of this section has been substituted for the old heading "Appointment and powers of inspectors to investigate ownership of company."

**248. Information regarding persons having an interest in company, or in body corporate or firm acting as managing agent thereof.—**(1) Where it appears to the Central Government that there is good reason to investigate the ownership of any shares in or debentures of a company, or of a body corporate which acts or has acted as the managing agent or secretaries and treasurers of a company, and that it is unnecessary to appoint an inspector for the purpose, the Central Government may require any person whom it has reasonable cause to believe—

(a) to be, or to have been, interested in those shares or debentures ; or

(b) to act, or to have acted, in relation to those shares or debentures, as the legal adviser or agent of someone interested therein ;

to give the Central Government any information which he has, or can reasonably be expected to obtain, as to the present and past interests in those shares or debentures, and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to the shares or debentures.

(2) For the purposes of sub-section (1), a person shall be deemed to have an interest in a share or debenture—

(a) if he has any right to acquire or dispose of the share or debenture or any interest therein or to vote in respect thereof ;

(b) if his consent is necessary for the exercise of any of the rights of other persons interested therein ; or

(c) if other persons interested therein can be required, or are accustomed, to exercise their rights in accordance with his directions or instructions.

(3) Where it appears to the Central Government that there is good reason to investigate the ownership of any interest in a firm which acts or has acted as managing agent or as secretaries and treasurers of any company, and that it is unnecessary to appoint an inspector for the purpose, the Central Government may require any person whom it has reasonable cause to believe—

(a) to have, or to have had, any interest in the firm ; or

(b) to act, or to have acted, in relation to any such interest, as the legal adviser or agent of someone interested therein ;

to give the Central Government any information which he has, or can reasonably be expected to obtain, as to the present and past interests held in the firm, and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to any such interest.

(4) Any person—

(a) who fails to give any information required of him under this section ; or

(b) who, in giving any such information, makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular ;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

This section also is new. It corresponds to s. 173 of the English Act of 1948—*Notes on Clauses.*

In this section the present heading has been substituted by the Lok Sabha for the old heading "Power to require information as to persons interested in shares or debentures or in interest in managing agency firms etc.

**249. Investigation of associateship with managing agent etc.—**(1) Where any question arises as to whether any body corporate firm ; or individual is or is not, or was or was not, an associate of the managing agent or secretaries and treasurers of a company and it appears to the Central Government that there is good reason to investigate such question, it may either—

(a) appoint an inspector for the purpose of making the investigation ; or

(b) if it considers it unnecessary to appoint an inspector as aforesaid, require any person whom it has reasonable cause to believe to be in a position to give relevant information in regard to the question, to furnish the Central Government with information on such matters as may be specified by it.

(2) The provisions of section 247 shall apply *mutatis mutandis* to cases falling under clause (a) of sub-section (1) and those of section 248 to cases falling under clause (b) of that sub-section.

This section also is new. It provides for an investigation as to whether a particular person is or is not, or was or was not an associate of a managing agent—*Notes on Clauses.*

In this section the present heading has been substituted by the Lok Sabha for the old heading "Investigation regarding association with managing agent."

**250. Imposition of restrictions on shares or debentures.—**(1) Where in connection with an investigation under section 247, 248 or 249, it appears to the Central Government that there is difficulty in finding out the relevant facts about any shares (whether issued or to be issued), and that the



difficulty is due wholly or mainly to the unwillingness of the persons concerned or any of them to assist the investigation as required by this Act, the Central Government may, by order, direct that the shares shall, until further order, be subject to the restrictions imposed by this section.

(2) So long as any shares are directed to be subject to the restrictions imposed by this section,—

(a) any transfer of those shares shall be void ;

(b) where those shares are to be issued, they shall not be issued ; and any issue thereof or any transfer of the right to be issued therewith, shall be void ;

(c) no voting rights shall be exercisable in respect of those shares ;

(d) no further shares shall be issued in right of those shares or in pursuance of any offer made to the holder thereof ; and any issue of such shares, or any transfer of the right to be issued therewith, shall be void ; and

(e) except in a liquidation, no payment shall be made of any sums due from the company on those shares, whether in respect of dividend, capital or otherwise.

(3) Where the Central Government makes an order directing that any shares shall be subject to the said restrictions, or refuses to make an order directing that any shares shall cease to be subject thereto, any person aggrieved thereby may apply to the Court, and the Court may, if it sees fit, direct that the shares shall cease to be subject to the said restrictions.

(4) Any order (whether of the Central Government or of the Court), directing that any shares shall cease to be subject to the said restrictions, which is expressed to be made with a view to permitting a transfer of those shares, may continue the restrictions mentioned in clauses (d) and (e) of sub-section (2), either in whole or in part, so far as they relate to any right acquired, or offer made, before the transfer.

(5) Any person who—

(a) exercises, or purports, to exercise, any right to dispose of any shares or of any right to be issued with any such shares, when to his knowledge, he is not entitled to do so, by reason of any of the said restrictions applicable to the case ;

(b) votes in respect of any such shares whether as

holder or proxy, or appoints a proxy to vote in respect thereof, when, to his knowledge, he is not entitled to do so by reason of any of the said restrictions applicable to the case ; or

(c) being the holder of any such shares, fails to give notice of the fact of their being subject to the said restrictions to any person whom he does not know to be aware of that fact but whom he knows to be entitled, apart from such restrictions, to vote in respect of those shares, whether as holder or as proxy ;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

(6) Where shares in any company are issued in contravention of such of the said restrictions as may be applicable to the case, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(7) A prosecution shall not be instituted under this section except by, or with the consent of, the Central Government.

(8) This section shall apply in relation to debentures as it applies in relation to shares.

This section also is new. It is based on s. 174 of the English Act of 1948. A few drafting alterations have been made—*Notes on Clauses*.

In the beginning of the heading of this section the Lok Sabha has substituted the words "Imposition of" for "Power to impose".

**251. Saving for legal advisers and bankers.**—Nothing in sections 234 to 250 shall require the disclosure to the Registrar or to the Central Government or to an inspector appointed by that Government—

(a) by a legal adviser, of any privileged communication made to him in that capacity, except as respects the name and address of his client ; or

(b) by the bankers of any company, body corporate, managing agent, secretaries and treasurers or other person, referred to in the sections aforesaid, as such bankers, of any information as to the affairs of any of their customers other than such company, body corporate, managing agent, secretaries and treasurers or person.

This section also is new. It corresponds to s. 175 of the English Act of 1948—*Notes on Clauses*.

## CHAPTER II

### DIRECTORS

#### *Constitution of Board of Directors*

**252. Minimum number of directors.**—(1) Every public company, and every private company which is a subsidiary of a public company, shall have at least three directors.

(2) Every private company which is not a subsidiary of a public company shall have at least two directors.

(3) The directors of a company collectively are referred to in this Act as the “Board of directors” or “Board.”

This section corresponds to s. 83A of the previous Act and s. 176 of the English Act of 1948. It is based on the draft of s. 83A (1) suggested at page 355 of the C. L. C. R. in pursuance of para 82 of that Report. Sub-s. (3) contains a definition of “Board of Directors”—*Notes on Clauses*.

It may be noted that under the English Companies Act, 1948 (s. 176) every company (other than a private company) registered on or after 1st November, 1929 is required to have at least two directors and every company registered before that date and every private company to have a director.

Under the Act prior to that of 1913 it was not obligatory upon a company to have directors (66).

**967. Number &c. of directors** .—The number, appointment, powers and duties and the proceedings of the meetings of directors were regulated by the company's articles of association, and where the articles were not registered, by Table A in the First Schedule of the Act (67). The section does not set any limit to the maximum number of directors of a company. The articles usually provide that until otherwise determined by a general meeting, the number of directors shall not be less than, say five nor more than, say nine. In such cases it is open to the shareholders to vary the number of directors without altering the article itself (68).

Where an article absolutely prescribed a maximum and minimum number of directors without any qualifying words “until otherwise determined by a general meeting”, the company could not by an ordinary resolution in a general meeting increase the number beyond the prescribed maximum (69). The maximum number of directors absolutely prescribed by an article can be exceeded only by altering the articles under s. 31.

**968. True position of directors** :—The true position of directors seems to be that of agents for the company with powers and duties of carrying on the whole of its business subject to the restrictions imposed by the articles and the statutory provisions (70). But they are not agents for the shareholders (71).

(66) *Bulawayo's Market & Offices Co.* [1907] 2 Ch. 458; cf. s. 92 of Act VI of 1882.

(67) S. 18 of the previous Act.

(68) *Gur Prasad v. Rameswar* [1933] A. 344, [1933] A.L.J. 290, 143 I.C. 7.

(69) *Ramkissandas v. Satya Charan* [1946] 50 C.W.N. 310.

(70) *Faure Electric Accumulator Co.* [1888] 40 Ch. D. 141; *Lands Allotment Co.* [1894] 1 Ch. 616; *Dikshit & Co. v. Mathura Prasad* [1924] 22 A.L.J. 883; *Port Canning &c. Co.* [1871] 6 B.L.R. 278; *Gulab Singh v. Punjab Zemindara Bank* [1942] I. 47, 43 P.L.R. 619, 199 I.C. 667 (S.B.)

(71) *Gramophone & Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89, 105 (C.A.); *Percival v. Wright* [1902] 2 Ch. 421.

Corzens-Hardy, L. J. observed: "I do not think it true to say that the directors are agents. I think it more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the share-holders" (72). Upon a careful consideration it will appear that the directors are, strictly speaking, neither agents nor trustees for the company (73).

Directors are not trustees for third parties who have made contracts with the company (74). They are however trustees for the company of their power of approving transfers, issuing and allotting shares and making calls (75). But the directors are not trustees in the strict sense of the term as observed by Lord Justice James: "A trustee is a man who is the owner of property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his *cestui que trust*. The same person may fill the office of director and also be trustee having property, but that is rare, exceptional and casual circumstance. The office of a director is that of a paid servant of the company. A director never enters into a contract for himself, but for his principal, that is, for the company of which he is a director and for whom he is acting. He cannot sue on such contracts, nor be sued on them (unless he exceeds his authority). This seems to me to be the broad distinction between trustees and directors" (76).

A director is not in the position of a trustee of his shares for the general body of shareholders, and under ordinary circumstances he may deal with them as freely as any other shareholder provided he does not part with his qualification. But he is a trustee of making calls for the general body of shareholders, and must not use it for his own benefit without regard to their interests (77).

A director or a managing director is not a servant of the company (78).

**969. Director's fiduciary position** :—Generally speaking a director stands in a fiduciary position to the company (79), and cannot retain a profit made by him (80), but the constitution of the company may permit him to do so (81) and even to override the wishes of the majority of the shareholders (82). In any event he can exercise his individual rights as a corporator (83). Directors are not trustees for individual shareholders (84), and in the absence of unfair dealing may buy shares from or sell shares to the members without giving them information relating to the prospects of the company known to them but not to the members (85). If there is any misrepresentation in acquiring the shares or options over them, the directors may be trustees of the profit they make in the transaction (86). Directors, who so use their powers as to obtain benefits for themselves at the expense of the other shareholders

(72) *Automatic Self-Cleansing Filter Co. v. Cunningham* [1906] 2 Ch. 34 at p. 45.

(73) See the observation of Lord Justice James in *Smith v. Anderson* [1880] 15 Ch. D. 247 at p. 275.

(74) *Bath v. Standard Land Co.* [1911] 1 Ch. 618.

(75) *Punt v. Symons & Co.* [1903] 2 Ch. 506.

(76) *Smith v. Anderson* [1880] 15 Ch. D. 247 at p. 275; see the observations of Romer J. in *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407 at p. 426.

(77) *Gilbert's case* [1870] 5 Ch. App. 559.

(78) *Lee Behrens & Co.* [1932] 2 Ch. 46; *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D. 672; *Normandy v. Ind, Coope & Co.* [1908] 1 Ch. 84; *Gulab Singh v. Punjab Zemindara Bank* [1942] L. 47, 43 P.L.R. 619, 199 I.C. 667 (S.B.).

(79) *Cavendish-Bentinck v. Fenn* [1887] 12 App. Cas. 652.

(80) *Cook v. Deeks* [1916] 1 A.C. 554.

(81) *Costa Rica Ry. Co. v. Forwood* [1901] 1 Ch. 716.

(82) *Salmon v. Quin & Axtens* [1909] 1 Ch. 311.

(83) *North-West Transportation Co. v. Beatty* [1887] 12 App. Cas. 589.

(84) *Wilson v. Macanliffe* [1895] 18 All. 56.

(85) *Percival v. Wright* [1902] 2 Ch. 421.

(86) *Allen v. Hyatt* [1914] 30 T.L.R. 444.

without informing them of the facts, can not be allowed to retain those benefits and must account for them to the company (87). The law in this respect has been clearly laid down by their Lordships of the Judicial Committee in the following passages: "They view the transaction as one wholly detrimental to the interests of the company. Moreover even if (contrary to their Lordships' opinion) some benefit did accrue to the old company from the transaction, the overriding fact remains that the old company (acting through its directors and not by its shareholders in general meeting) purported to apply its property for the benefit of those directors. In such a case it is well settled that the Court will treat the transaction as unenforceable, and refuse even to enquire whether the company has derived any benefit from it: and on that ground the company has not received the protection to which it is entitled. In *Aberdeen Railway Co. v. Blakie* [1854] 1 Macq. 365 Lord Cranworth, L. C. used the following language which seems appropriate to the present case."

"This therefore brings us to the general question whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into . . . . So inflexible is the rule that no inquiry on that subject is permitted . . . ."

"The language used by Atkin L. J. in *Underwood v. Bank of Liverpool* [1929] 1 K.B. 775 at p. 796 may well be cited in this connection: 'It was contended that the fact that Underwood was the sole director and practically the sole shareholder, gave him, in pursuance of the articles, actual authority. He was entrusted with all the powers of the company, the company can only act through its directors, and the directors or director, if only one, could do what they willed with the company's assets. If this means anything, it means that a board of directors, acting as such, have actual authority to defraud the company by using the company's assets to pay debts due to butchers or money-lenders by the individual directors. Such an act is quite outside the class of acts—management of the company's business—authorized to be done by the board. The directors, whether collectively or singly, have not actual authority to steal the company's goods' " (88).

Where the directors of a company obtained with their own money shares of a subsidiary company by reasons, and only by reason, of the fact that they were directors of the main company and in the course of the execution of that office, and the shares were subsequently sold at a profit, it was held by the House of Lords that the directors were accountable to the company of which they were the directors for the profits which they had made out of them (89). "The sole ground", observed Lord MacMillan, "on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilized the position and knowledge possessed by them in virtue of their office as directors, and that transaction

(87) *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56 (C.A.).

(88) *E. B. M. Co. v. Dominion Bank* [1937] P.C. 279, 170 I.C. 545 (P.C.).

(89) *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 A.E.R. 378 (H.L.) at p. 389.

resulted in a profit to themselves" (90). "Equity prohibits a trustee from making any profit by his management, directly or indirectly" (90). It was contended in the last cited case that it was impossible for the Regal, the main company, to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. But the argument was not accepted. The directors "could", observed Lord Russell of Killowen, "had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain" (91).

In the matter of disposal of shares, the directors are merely trustees for the company and if they dispose of the shares at a premium, they are liable to account to the company for the profits with interest. They will not be allowed to retain the profit even on the ground of the acquiescence of the shareholders to be inferred from the presumed knowledge of the share book (92). But directors are not trustees in whom the property of the company has become vested in trust for any specific purpose within the meaning of s. 10 of the Limitation Act (93). Although the position of directors differs from that of trustees in some respects, yet to the extent of their being entrusted with the moneys of the company, they are trustees and are jointly and severally liable for breach of trust (94). The assets of a company are entrusted to the directors to be applied to certain defined objects, and they are responsible as for a breach of trust, if they apply them to other objects (95).

If a director lends money to the company and becomes its creditor, the transaction is not a contract entered into between two independent persons. It is in the nature of a contract between the trustee and his *cestui que trust*. It is not therefore right that the director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness (96). A director is not entitled to recover money from the company, advanced at the request of its secretary, where the latter has no power to borrow on behalf of the company and where the request is not made or confirmed by a properly constituted meeting of the directors, even if the company derived some benefit (97).

**970. Rights of directors :—**The right of persons duly elected to exercise the offices and functions of directors would, if interfered with on the part of the company acting through the other directors or officers of the company, be enforceable by the High Court by mandamus (98).

**Right of possession.** Primarily the right of possession and of running the undertaking is that of the Board of directors and not of the managing agent under the law. Therefore where possession of the undertaking is required to be given to a company it should be given to the Board, and consequently, the person entitled to possession is the nominee of the chairman of the Board (99). Holding over such possession involves all kinds of property and assets of the company including its books registers etc. (99).

(90) Ibid, at p. 391.

(91) Ibid, at p. 389.

(92) York & N. M. Roy. Co. [1845] 16 Beav. 485.

(93) Narasimha v. Official Assignee [1931] M. 58, 54 Mad. 153, 60 M.L.J. 280.

(94) Peninsular Locomotive Co. v. Reed [1937] Pat. 293, 168 I.C. 786; Ramskill v. Edwards [1885] 31 Ch. D. 100; Carriage Corpn. &c. Assn. [1884] 27 Ch. D. 322.

(95) Peninsular Locomotive Co. v. Reed (supra).

(96) Thakur Das v. Ram Gulam [1937] Pat. 151. See also A. H. Mahomed Ismail & Co. v. Sachidananda [1936] 40 C.W.N. 769.

(97) Cleadon Trust Ltd. [1938] Ch. 660, affirmed by the Court of Appeal in [1939] 1 Ch. 286.

(98) In re Albert Mills Co. [1872] 9 Bom. H.C.R. 438.

(99) Jagdish Prasad v. Govt. of State of U. P. [1955] N.U.C. 3595 (All.).

**971. Directors' powers :—**If the directors act outside their powers but within those of the company, the members can ratify and make such act valid (1). But if they act *ultra vires* the company, the members cannot ratify or acquiesce in such act (2), articles being a contract between the members *inter se* (3). When a company has delegated its powers and duties to directors and there is a deadlock which prevents the directors fulfilling their duties, the company can then act (4). A company cannot take the control of its affairs out of the hands of the directors and give powers to a committee except in the manner provided in the articles; so, if there be no power to remove directors, the company will have to wait until the articles are altered or the obnoxious directors retire in due course (2) or is removed under s. 284 *post*. "A company is an entity," observed Lord Justice Greer, "distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders" (5).

The company is bound by contracts made by the directors acting within the scope of their authority (6), even if they are influenced by some improper motive or intention to derive profit for themselves (7). The remedy of the company in such a case is against the directors (8). If they act outside their powers, but within those of the company, the shareholders can ratify their action by an ordinary resolution (9). It has been held that where an agent accepts or endorses a bill or note "per pro" the taker is bound to inquire as to the extent of the agent's authority; but where the agent has such authority, his abuse of it does not affect a *bona fide* holder for value (10). A company is liable for all the acts done by its directors, even though unauthorized by it, provided such acts are within the apparent authority of the directors and not *ultra vires of the company* (11). Where by the articles the directors were directed forthwith to execute by affixing seal of the company the scheduled agreement entered into with a firm, strangers to the company are entitled to assume that that direction has been carried out, and that as a consequence the firm is entitled to act as managing agents with the powers conferred by the scheduled agreement (12). Where money had been paid to A by B in circumstances such that A by action could not have recovered moneys from B, but such that there is nothing unconscionable

(1) *Nagar Damodar v. Gudlimar* [1915] 39 Mad. 101.

(2) *Automatic S. C. F. Syndicate v. Cunninghame* [1906] 2 Ch. 34; see also *Quin & Axtens v. Salmon* [1909] A.C. 442; *Gramophone &c. Ltd. v. Stanley* [1908] 2 K.B. 89; see the observation of Buckley L.J. at p. 105.

(3) *Browne v. La Trinidad* [1887] 37 Ch. D. 1.

(4) *Barron v. Potter* [1914] 1 Ch. 895; *Foster v. Foster* [1916] 1 Ch. 532; *Isle of Wight Ry. Co. v. Tahourdin* [1883] 25 Ch. D. 320.

(5) *John Shaw & Sons, Ltd. v. Shaw* [1935] 2 K.B. 113 (C.A.) at p. 134.

(6) *Nursej Spinning & Weaving Co.* [1880] 5 Bom. 92.

(7) *Bryant v. La Banque du Peuple* [1893] A.C. 170.

(8) *Ram Baran v. Maffassal Bank* [1924] 83 I.C. 149, [1925] A. 206.

(9) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 266; *Grant v. United K. S. Rys. Co.* [1888] 40 Ch. D. 135 (138-39).

(10) *Bryant v. La Banque du Peuple*, *supra*.

(11) *Royal British Bank v. Turquand* [1856] 6 F. & B. 327; *Rambaran v. Maffassal Bank* [1925] A. 206, 83 I.C. 142; *Dehra Dun Mussorie E. Tramways Co. v. Jagamander* [1932] A. 141, [1931] A.L.J. 1038, 134 I.C. 244.

(12) *Sree Minakshi Mills v. Callianjee* [1935] M. 799, 68 M.L.J. 510, 156 I.C. 570.

or improper in A. having been in fact paid, retaining the money, B cannot sue A to recover the amount so paid though not legally due by him (13).

Where one of the directors of a company acknowledged a debt of the company by signing his name and affixing a rubber stamp bearing the company's name and the word "director" appearing below his signature, but this director had no formal authority from the Board, the acknowledgment however being in the ordinary course of business, it was held that such an acknowledgment was sufficient to save limitation within the meaning of s. 19 of the Limitation Act (14). But "the acts of an individual director", observed Westropp, J., "acting in his private capacity cannot and ought not to bind the Board, unless it authorized or ratified his conduct" (15).

The general clause in the articles giving the directors powers of management and all the powers of the company which are not otherwise dealt with, cannot be construed *ejusdem generis*, but it is valid and effectual (16). The directors are the only persons who can deal with the matters thus assigned to them and their decision cannot be overruled by a general meeting of the shareholders [see note (2) supra], unless the directors act in their own interest against the interest of the company (17). They should however communicate their policy to the shareholders and are bound to do so, if it is attacked by a member (18).

If a director sell a property, already his own, to the company at an enhanced price, the latter cannot claim the profits; its remedy is to rescind the contract returning the property. But if that is impossible, it cannot claim either the profit or damages (19). Where the benefit of a contract belongs in equity to the company, the director cannot validly use their voting power to vest it in themselves (20).

In the absence of fraud or oppression the votes of interested directors in general meetings are valid, and a majority cannot sue to set aside the transaction (21). But if the directors are seeking to appropriate to themselves the company's property, not even a resolution of the general meeting carried by their votes will protect them, and a single member can sue (22).

The directors are however the proper persons for instituting a suit and the company is the proper plaintiff in such an action (23). But effect should be given to the wishes of the majority of shareholders. When they desire that proceedings should be taken, an action may be commenced in the company's name as plaintiff by such majority, or even in case of urgency, by one or more shareholders who believe that they have the support of the majority and subsequently obtain the sanction of a general meeting (24).

When it comes to the knowledge of the Court that a suit has been brought without the authority of the plaintiff named on the record the action will be struck out and any order made in the course of the proceedings will be discharged (25).

(13) *Sree Minakshi Mills v. Callinanjee* [1935] M. 799, 68 M.L.J. 510, 156 I.C. 570.

(14) *Amulya v. Coral Engineering Works* [1929] C. 155, 48 C.L.J. 597, 115 I.C. 177.

(15) *East India Trading & Banking Co.* [1867] 3 Bom. H.C.R. (O.C.J.) 113 at p. 123.

(16) *Pyle Works No. 2* [1891] 1 Ch. 173.

(17) *Marshall's Valve Gear Co. v. Manning, Wardle & Co.* [1909] 1 Ch. 267.

(18) *Peel v. London & N. W. Ry. Co.* [1907] 1 Ch. 5.

(19) *Jacobus Marler Estates v. Marler* [1916] 114 L.T. 640n., 85 L.J. (P.C.) 167n.

(20) *Cook v. Deeks* [1916] 1 A.C. 554.

(21) *North-West Transportation Co. v. Beatty* [1887] 12 App. Cas. 589; *Burland v. Earle* [1902] A.C. 83.

(22) *Cook v. Deeks* (supra).

(23) *Burland v. Earle* (supra).

(24) *I.a Compagnie de Mayville v. Whitley* [1896] 1 Ch. 788, 803. But see *Quin & Axtens v. Salmon* [1909] A.C. 442 and *Automatic S. C. Filter Co. v. Cuninghame* (supra).

(25) *Daimler Co. v. Continental Tyre Co.* [1916] 2 A.C. 307. In this case the secretary without authority instructed a solicitor to commence proceedings in the company's name.



The directors are not entitled to use their power of issuing shares for the purpose merely of retaining control of the company's affairs or defeating the wishes of the existing shareholders (26).

Where a director is a shareholder of another company, whether beneficially or as a trustee, he is precluded, without regard to the quantum of his holding, from dealing, on behalf of the company of which he is a director, with the other company, unless and so far as he is authorized by the articles (27). If the second company has notice of the irregularity, the first company may obtain rescission, even after completion, provided that rescission is still possible (27).

**972. Limitation of powers :—**Persons dealing with a company are deemed to have notice of such limitations of the directors or of the company as are contained in the memorandum or articles of association (28). So they cannot rely upon ignorance of the limitations (29). A person dealing with the directors must take the articles of association to be such as appear at the office of the Registrar of Companies (30).

**973. Ultra vires acts of directors :—**A company is not bound by acts *ultra vires* of its directors, unless such acts have been expressly ratified by all the shareholders, or unless all with knowledge or notice have acquiesced in what has been done (31). "To render valid", observed their Lordships of the Privy Council, "an act of the directors of a company which is *ultra vires*, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, *viz.*, the acquiescence of each and every shareholder of the company. Of course the acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. . . . By knowledge of the transaction Lord Chelmsford clearly meant knowledge of the invalidity of the transaction. . . . There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality" (32), following *Irvine v. Union Bank of Australia* (33) where Sir Barnes Peacock delivering the judgment of the Privy Council said: "Their Lordships think that it would be competent for a majority of the shareholders present. . . . at an extraordinary meeting convened for that object, and of which object due notice had been given to ratify an act previously done by the directors in excess of their authority, and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting." Mere acquiescence of the shareholders would not however amount to ratification (32).

The assets of a company cannot be disposed of by a resolution of the directors only. They can only be disposed of after the resolution of the shareholders passed at a special meeting called for the purpose of winding up the company. A resolution of the directors for the purpose of such disposal is *ultra vires* (34). Where in respect of the policy-holders' trust fund the articles of association empowered the

(26) *Piercy v. S. Mills & Co.* [1920] 1 Ch. 77.

(27) *Transvaal Lands Co. v. New Belgium & Co.* [1914] 2 Ch. 488.

(28) *Quin & Axtens v. Salmon* [1909] A.C. 442.

(29) *Ashbury Ry. Carriage & Iron Co. v. Riche* [1875] 7 H. L. 653; *Baroness Wenlock v. River Dec Co.* [1885] 10 App. Cas. 354.

(30) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366.

(31) *Bhagirath Spinning & Weaving Co. v. Balaji Bhavani* [1930] B. 207, 54 Bom. 178.

(32) *Premila Devi v. Peoples Bank of N. India* [1938] P.C. 284, 43 C.W.N. 205.

(33) [1877] 12 App. Cas. 366 at p. 375.

(34) *U Ba Din v. Janki Devi* [1938] Rang. 447. See s. 293.

directors by a unanimous resolution to purchase property, it was held that the resolution of the directors authorizing the construction of a building was *ultra vires* and opposed to the articles of association, purchase of property not being the same thing as the erection of a house (35).

**974. Directors' remuneration** :—Directors are not entitled to any remuneration (36), as of right, unless the articles provide for it and fix the amount (37). In the absence of a provision to that effect, any remuneration given them is in the nature of a gratuity. In a going company a general meeting may vote a gratuity beyond the amount prescribed in the articles; but upon liquidation this cannot be done (38). If the director's appointment has not been validly made, he cannot recover any remuneration, although he may have served for a long time (39). If the articles provide that a director will receive remuneration at the rate of so much per annum, he will be entitled to a proportionate amount for a broken period (40), but if it is a payment for a year, he cannot get it if he does not serve for the whole year (41). Where the articles declare that the fees are to be divided among the directors in such proportions as they shall determine, no director can sue for his fees until the directors have determined the proportion (42). The continuing directors may determine that a retiring director shall not receive any part of the remuneration (43). When the remuneration is by a percentage of profits, it does not include a share of the profits made on the sale of the whole business of the company (44); but it will include profits which exist in specie, even though not converted into cash until after liquidation (45). The sale of the bulk of the company's properties, so that the directors' duties are greatly reduced, does not disentitle them to their full remuneration (46).

Where the articles are silent, a general meeting may vote the director's remuneration which is in the nature of a gratuity (47). This cannot however be done after the company has gone into liquidation (48). But where remuneration is allowed, it may be proved as a debt on winding up in competition with the ordinary creditors (49).

Where one of the objects of a company is to promote other companies, a director is not entitled to claim any remuneration for performing any duties in connection with the promotion of a new company over and above what has been fixed as his remuneration by the articles (50). A resolution passed by the directors, while the company is a going concern, to forego or postpone their fees will be binding (46).

- (35) *United India Life Assurance Co. v. Krishna Rao* [1934] M. 411, 67 M.L.J. 336.
- (36) *George Newman & Co.* [1895] 1 Ch. 674; *Dikshit & Co. v. Mathura Prasad*, *infra*; *Woolf v. East Nigel & Co.* [1905] 21 T.L.R. 660.
- (37) *Dover Coalfields Extension* [1908] 1 Ch. 65; *Young v. Naval & M. C. Society* [1905] 1 K. B. 687; *Dikshit & Co. v. Mathura Prasad* [1925] A. 71, 47 All. 94, 22 A.L.J. 883.
- (38) *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D. 654; *Stroud v. Royal Aquarium* [1903] 89 L.T. 243; *Warren v. Lambeth Water Works* [1905] 21 T.L.R. 685.
- (39) *Woolf v. East Nigel & Co.* [1905] 21 T.L.R. 660.
- (40) *George Newman & Co.* (*supra*); per *Younger L. J.* in *Moriarty v. Regents Garage Co.* [1921] 2 K.B. 766 at p. 786; *Diamond v. English Sewing Cotton Co.* [1922] W. N. 237.
- (41) *British Murac & Rubber Syndicate v. Alperton Rubber Co.* [1915] 2 Ch. 186.
- (42) *Plantations Trust v. Bila Rubber Lands* [1916] 85 L.J. (Ch.) 801, 114 L.T. 676.
- (43) *Gilman v. Guchar & Co.* [1886] 3 T.L.R. 133; *Joseph v. Sonora Land Co.* [1918] 34 T.L.R. 220.
- (44) *Frames v. Bultfontein Mining Co.* [1891] 1 Ch. 140.
- (45) *Spanish Prospecting Co.* [1911] 1 Ch. 92.
- (46) *Consolidated Nickel Mines* [1914] 1 Ch. 883.
- (47) *George Newman & Co.* (*supra*).
- (48) *Stroud v. Royal Aquarium* (*supra*).
- (49) *Exp. Beckwith* [1898] 1 Ch. 324.
- (50) *Dikshit & Co. v. Mathura Prasad* *supra*.

A company cannot ratify the payment by directors of remuneration in excess of that allowed by the articles without altering the articles or passing a special resolution (51). Directors cannot pay the income-tax on their remuneration out of the company's assets (51).

Unless authorized by the articles the directors cannot vote themselves remuneration or make present to themselves, or to one of their body, out of the company's funds (52).

**975. Compensation for loss of office :—**As to the claim for compensation for loss of office by a governing director see *T. N. Farrer Ltd.* [1937] 1 Ch. 352 where it has been held that such a claim of a life director on a voluntary liquidation was not maintainable as his employment as such was conditional on the continued existence of the company and ceased automatically when it was wound up. See now ss. 318 to 321.

**976. Resignation :—**Subject to the provisions in the articles a director can resign his office (53), and the resignation takes effect from the date on which notice is given which cannot be withdrawn without the consent of the company, even though no acceptance has taken place (53). A company cannot be compelled to employ a director against his will (54). The remedy lies in damages for breach of contract, if there be any (54). A director who is unsatisfactory may be removed by the company, but the power of removal is governed entirely by the articles (55) and s. 284.

**977. Indemnification :—**A director who incurs liability in acting as an agent of the company is entitled to be indemnified by the company (56). Being agents of the company, the directors are not liable to strangers for the acts and defaults of the company (57), unless they pledge their personal credit (58). Where a director gave an undertaking in writing expressed to be made "jointly and severally" for payment of salary to an employee of the company followed by the signature of the director as "managing director", there was no remedy under the contract against him personally (59). An indemnity clause in the articles such as "the directors or auditors shall not be answerable for any loss, damage &c. unless they shall happen by or through their own wilfull neglect or default" saved them from a misfeasance summons (60).

**978. Directors' powers and liabilities :—**A director can compromise an action against the company in the interest of the company although the action may be ill-founded (61). Directors cannot by a contract deprive themselves of the power to control a manager so as to confer powers on him to the exclusion of themselves (62).

(51) *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 148.

(52) *Young v. Naval Society* [1905] 1 K.B. 687; *Boschoek &c., v. Fuke* (supra).

(53) *Glossop v. Glossop* [1907] 2 Ch. 370; *Shivlal v. Tricumdars Mills Co.* [1911] 36 Bom. 564, 14 Bom. L.R. 45; but see *Municipal Freehold Land Co. v. Pollington* [1890] 63 L.T. 238 where Kekewich J. has held that a director cannot resign his office to his colleagues and must be held responsible as a director up to the date of the general meeting. But this, it is apprehended, depends entirely on the articles of association of a particular company. See s. 283.

(54) *Bainbridge v. Smith* [1889] 41 Ch. D. 462.

(55) See *Browne v. La Trinidad* [1887] 37 Ch. D. 1.

(56) *Famatina D. Corporation* [1914] 2 Ch. 271.

(57) *Chapman v. Smethurst* [1901] 1 K.B. 927.

(58) *Dutton v. Marsh* [1871] 6 Q.B. 361; *Gadd v. Houghton* [1876] 1 Ex. D. 357, 35 L.T. 222.

(59) *Re Lavey, Ex. p. Trustee* [1920] 1 K.B. 674.

(60) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407; but now see s. 201.

(61) *Bath's case* [1878] 8 Ch. D. 334; *Dixon's case* [1870] 5 H.L. 606.

(62) *Horn v. Henry Faulder & Co.* [1908] 99 L.T. 524.

But if they have power of delegation, a stranger may assume that it has been properly exercised (63); and this applies to persons having apparent though not actual authority (64). Actual or constructive notice of the irregularity will however deprive the party dealing with the company of this protection (65).

Where shareholders know that their directors have been exceeding their legal powers and take no steps in the matter, but allow the things done to remain unimpeached for years, they must be taken to have retrospectively sanctioned what has been done (66). But a company is not bound by acts *ultra vires* of its directors unless such acts have been expressly ratified by the shareholders, or unless all with knowledge or notice have acquiesced in what has been done (67).

A director is liable for misapplication of the company's money though it has not gone into his pocket. But he has the protection of s. 633, even if the act is *ultra vires*, but done in good faith (68). Directors are not liable for fraud or misconduct (e.g., issuing fraudulent prospectus) of their co-directors or other persons employed by the company (69), unless they have expressly or tacitly permitted its commission (69).

A director is not responsible for declaring a dividend unwisely. He is liable if he pays it out of capital, but the onus of proving it lies upon the person who alleges it (70). The directors cannot be made liable for an infringement of patent by the company merely by reason of their position as directors, even in a case where they are the sole directors and shareholders of the infringing company (71).

Where it is provided in the articles of association that the directors shall not be liable for "wilful default", they must be shown to have known that they were doing wrong (72). For the meaning of the expression "wilful default" see notes to s. 40 *ante*. A director is entitled to rely on his subordinates doing their duty in the absence of any ground for suspicion, and is not liable if the company sustains damage owing to the fraud and neglect of such subordinates (73). On this question in the case of the *National Bank of Wales* (74), Lindley, M. R. observed: "Business cannot be carried on upon principles of distrust. Men in responsible position must be trusted by those above them, as well as those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director, acting honestly himself, to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men." This case was taken to the House of Lords in *Dovey v. Cory* (75) where Lord Davey said: "I think respondent was bound to give his attention to exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended and it is not proved that he did not do so. But I think he was

- (63) *Totterdell v. Farcham Blue Brick Co.* [1866] 1 C.P. 674; *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93.
- (64) *Dey v. Pullinger Engineering Co.* [1921] 1 K.B. 77, overruling *Premier Industrial Bank v. Carlton Manufacturing Co.* [1909] 1 K.B. 106.
- (65) *Wandsworth Gas Light Co. v. Wright* [1870] 22 L.T. 404; *Irvine v. Union Bank of Australia* [1877] 12 App. Cas. 366.
- (66) *Houldsworth v. Evans* [1868] L.R. 3 H.L. 263, per Lord Cranworth.
- (67) *Bhagirath Spinning & Weaving Co. v. Balaji Bhavani* [1930] B. 267, 54 Bom. 178, 32 Bom. I.R. 87, 127 I.C. 419.
- (68) *Claridge's Patent Asphalte Co.* [1921] 1 Ch. 543; *Brazilian Rubber Estates* [1911] 1 Ch. 425.
- (69) *Cargill v. Bower* [1878] 10 Ch. D. 502.
- (70) *City Equitable Fire Insurance Co.*, *supra*.
- (71) *British Thompson Houston Co. v. Sterling Accessories Ltd.* [1924] 2 Ch. 33.
- (72) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407. But by the new s. 201 such provisions in the articles have been rendered void.
- (73) *Ibid*; *Dovey v. Cory* [1901] A.C. 477.
- (74) [1899] 2 Ch. 629 at p. 673.
- (75) [1901] A.C. 477 (493).

entitled to rely upon the judgment, information and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *In re Hallmark's case* (76), Chitty J. in *In re Denham & Co.* (77) that directors are not bound to examine entries in the company's books, it was the duty of . . . and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference." Omission on the part of a director to attend meetings of the company is not the same thing as neglect or omission of the duties which ought to have been performed at those meetings; so the director was not liable for the fraud of the paid officers of the bank (78). A director if employed as a servant to collect money for the company may however be convicted as a clerk or servant (79).

Where a retired director of *J. & J. Cash, Ltd.* set up the same class of business as *Joseph Cash Co.*, it was held that though the defendant's surname happened to be Cash he was not entitled to sell goods in a manner calculated or likely to mislead or deceive the public into the belief that the business of the defendant was the business of the plaintiff, and accordingly an injunction was granted (80).

Where a director purchased property without a mandate from the company and under such circumstances as did not make him a trustee thereof for the company, and thereafter he sold the same to the company at a profit, it was held that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time to treat the director as trustee of the profits made (81).

A Civil Court can grant an injunction on the application of a director restraining his co-directors from wrongfully excluding him from acting as a director (82).

As the shareholders leave all the business of the company in the hands of the directors, it is highly incumbent on them that they act without raising the slightest suspicion of dishonesty (83).

**979. Duties of directors :—**The manner in which the work of a company is to be distributed between the board of directors and the staff, is a business matter to be decided on business lines. The larger the business carried on by the company the more numerous and the more important the matters, they must of necessity be left to the managers, the accountants and the rest of the staff (84).

In ascertaining the duties of a director it is necessary to consider the nature of the company's business and the manner in which the work of the company is, reasonably in the circumstances and consistently with the articles, distributed between the directors and the other officials of the company. In discharging those duties a director (a) must act honestly, (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf; but (c) he need not exhibit in the performance of his duties a greater degree of skill than what can reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; he is (d) not bound to give continuous attention

(76) [1878] 9 Ch. D. 329.

(77) [1883] 25 Ch. D. 752.

(78) *Cardiff Savings Bank* [1892] 2 Ch. 100.

(79) *Queen v. Stuart* [1894] 1 Q.B. 310.

(80) *J. J. Cash, Ltd. v. Cash* [1900] 82 L.T. 655.

(81) *Burland v. Earle* [1902] A.C. 33.

(82) *Sarat v. Tarak* [1924] 51 Cal. 916, 28 C.W.N., 803.

(83) *Dikshit & Co. v. Mathura Prasad* [1924] 22 A.L.J. 883.

(84) *City Equitable Fire Insurance Co.* [1925] 1 Ch. 407.

to the affairs of his company; his duties are of an intermittent nature to be performed at periodical Board meetings and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings, he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is in the absence of suspicious grounds justified in trusting that official to perform such duties honestly (85).

A director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose, or that the cheque comes before him for signature in the regular way, having regard to the usual practice of the company. A director must of necessity trust the officials of the company to perform properly and honestly the duties allocated to them (85).

Before any director signs a cheque or parts with a cheque signed by him, he should satisfy himself that a resolution has been passed by the Board or committee of the Board authorizing the signature of the cheque; and where a cheque has to be signed between meetings, he should obtain the confirmation of the Board subsequently (85).

The authority given by the Board or committee should not be for the signing of numerous cheques to an aggregate amount, but a proper list of the individual cheques mentioning the payee and the amount of each should be read out at the Board or committee meetings and subsequently transcribed into the minutes of the meeting (86).

It is the duty of each director to see that the company's moneys are, from time to time, in a proper state of investment, except so far as the articles of association may justify him in delegating that duty to others (87).

Directors' duties cannot be shirked by leaving everything to others (88).

Before presenting the annual report and balance sheet to the shareholders and before recommending a dividend, directors should have a complete and detailed list of the company's assets and investments prepared for their own use and information and ought not to be satisfied as to the value of the company's assets merely by the assurance of their chairman, however apparently distinguished and honourable, nor with the expression of belief of their auditors, however competent or trustworthy (87).

It is not the duty of a big insurance company to supervise personally the safe custody of the securities of the company. It would be impracticable on every purchase of securities for actual delivery thereof to be made to the directors, or on every sale for the delivery to the brokers of the securities sold, to await a meeting of the Board or a committee of directors. The duty of seeing that the securities are in safe custody must of necessity be left to some official of the company in daily attendance at the office of the company, such as the manager, accountant or secretary (87).

An outsider dealing with a company cannot be compelled to search the register and find for himself whether a person who was permitted to act as a director for any length of time was also its directors *de jure* (89).

(85) *City Equitable Fire Insurance Co. (supra)*; see also *Overend & Gurney Co. v. Gibb* [1872] 5 H.L. 480; *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392; *Dovey v. Cory* [1901] A.C. 477; and *Brazilian Rubber Estate (supra)*.

(86) *City Equitable Fire Insurance Co. (supra)*, distinguishing *Joint Stock Discount Co. v. Brown* [1869] 8 Eq. 381.

(87) *Ibid.*

(88) *Drincqbier v. Wood* [1899] 1 Ch. 393.

(89) *Pudumjee v. Moos* [1925] 27 Bom. L.R. 1218, [1925] B. 28; *Mahony v. East Holyford Mining Co.* [1875] 7 H.L. 869.

**980. General observations :—**The articles of association, though not themselves a contract between the company and the director, must be regarded as showing the terms upon which on the one hand he agrees to act as a director and on the other hand the company agrees to pay him remuneration for his services (90). But the articles do not constitute a contract with the vendor (91).

One company could be a director or manager of another company (92). A director cannot make any profit out of his agency without the knowledge and consent of his principal—the company (93).

If there is no power to remove a director, the articles must first be altered to give such a power before he can be removed (94). But see s. 284.

A director can, if qualified, sustain an action in his own name against the other directors on the ground of individual injury to himself and for an injunction to restrain them from wrongfully excluding him from acting as a director (95).

A company is liable in an action of deceit for the fraud of its directors in managing the affairs of the company to the same extent as if the fraud were its own (96).

An article authorising the company in a general meeting from time to time to increase or reduce the number of directors, where such number has been absolutely prescribed within certain limits by another article, must be construed as authorising exercise of the power within those limits (97).

**981. Knowledge :—**The knowledge of a director is not necessarily the knowledge of the company (98). But if it is the duty of the director to disclose his knowledge to the company, then that knowledge may be attributed to the company (99). The knowledge of a common director (1), secretary (2), or manager (3), or other officer (4), is not necessarily a notice to the company. In order to prove such a notice it must be shown that it was his duty to the first company to communicate the fact to the second (2).

**982. Suit for removal :—**A suit challenging the position of a particular Board of directors and to remove the directors from the directorate is wrongly constituted. But a suit for a declaration that the plaintiff is a director and the protection of his rights *qua* director is competent (5).

See notes to s. 255.

**253. Only individuals to be directors.—**No body corporate, association or firm shall be appointed director of a public or private company, and only an individual shall be so appointed.

(90) *Molineux v. London &c. Insurance Co.* [1902] 2 K.B. 589, 596.

(91) *Caribbean Co.* [1875] 10 Ch. App. 614.

(92) *Bulaways Market & Offices Co.* [1907] 2 Ch. 458. But see now s. 253.

(93) *Parker v. Mc Kenna* [1875] 10 Ch. App. 96; *Bray v. Ford* [1896] A.C. 44, 50.

(94) *Imperial Hydropathic Hotel Co. v. Hampson* [1882] 23 Ch. D. 1.

(95) *Pulbrook v. Richmond &c. Co.* [1878] 9 Ch. D. 610; *Subramania v. United India L. I. Co.* [1928] M. 1215, 55 M.L.J. 385.

(96) *Barwick v. English Joint Stock Bank* [1867] L.R. 2 Ex. 259, 16 L. T. 461.

(97) *Ramkissandas v. Satya Charan* [1946] 50 C.W.N. 310.

(98) *Peruvian Railways Co. v. Thames Insurance Co.* [1867] 2 Ch. App. 617.

(99) *Mathern Steam Tramway Co. v. Lang* [1927] 33 Bom. L.R. 184.

(1) *Marseilles Extension Ry. Co.* [1871] 7 Ch. App. 161; *David Payne & Co.* [1904] 2 Ch. 608.

(2) *Fenwick Stobbs & Co.* [1902] 1 Ch. 507.

(3) *Hardy v. Metropolitan Land Co.* [1896] 2 Ch. 743.

(4) *Hampshire Land Co.* [1896] 2 Ch. 743.

(5) *Sati Nath v. Suresh Chandra* [1941] 1 Cal. 560.

This section is new. It is based on the draft of s. 83A (2) at page 355 of the C. L. C. R. It has been made clear that only an individual may be appointed as a director of the company and that neither bodies corporate nor associations or firms could be appointed as directors of companies—*Notes on Clauses*.

**254. Subscribers of memorandum deemed to be directors.**—In default of and subject to any regulations in the articles of a company, subscribers of the memorandum who are individuals, shall be deemed to be the directors of the company, until the directors are duly appointed in accordance with section 255.

This section corresponds to sub-s. (1), cl. (i) of s. 83B of the previous Act. It is based on sub-s. (1) (i) of the redraft of that section at page 336 of the Report—*Notes on Clauses*.

See Reg. 75 of Table A of the English Act of 1948.

983 Subscribers of memorandum :—If the first directors are not named in the articles, their appointment may be made by the subscribers to the memorandum of association either by the majority at a meeting of the subscribers or by a writing signed by all the subscribers (6).

**255. Appointment of directors and proportion of those who are to retire by rotation.**—(1) Not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall—

(a) be persons whose period of office is liable to determination by retirement of directors by rotation ;<sup>2</sup> and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

This section corresponds to the rest of s. 83B of the previous Act. It is based on sub-s. (2) (ii) of the redraft at page 356 of the C. L. C. R. Sub-s. (2) of the present section makes the position clear where there is no provision in the articles of the company as to how directors should be appointed in case not falling under sub-s. (1) —*Notes on Clause*.

Compare s. 87I of the previous Act.

Some verbal changes have been made in this section by the Joint Committee.

**984. Appointment of directors** :—Where the shareholders alone have the right to appoint directors, they cannot by agreement give another company a

(6) *John Morley Building Co. v. Barras* [1891] 2 Ch. 386, 392 ; *Great Northern Salt Works* [1890] 41 Ch. D. 472.



power to nominate a director (7); but if the articles authorise delegation of the power to a third party, the Court will recognize the right so delegated (8). A mere right of nomination will not necessarily amount to an appointment of the directors nominated, and the Court may grant or refuse specific performance of the agreement (9).

Under the old Act it has been held that a company could delegate to the Board of directors its power to appoint directors. Where a legally constituted Board was not in existence or not willing or unable to act, the delegation lapsed and the members could appoint directors this being the inherent right of the members of a company (10).

Where the express power of appointing additional directors is vested in the Board, it excludes any implied concurrent power to the same effect in the company (11). Where the power is given by the articles to the shareholders alone to appoint a managing director, the directors cannot by an agreement give him power to nominate a director (12).

See notes to s. 260 and Reg. 72 of Table A.

Where a person has accepted the office of director and acted as such, an agreement ought to be inferred that he will serve the company on the term as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and all the benefits which those articles provide for directors (13).

**985. Power to co-opt directors** :—Under the old Act the Board of directors had the power to co-opt directors if the articles so provided. This power did not come to an end only because an annual general meeting was convened, even if by direction of the Court (14). The power to co-opt directors might be exercised notwithstanding that the strength of the directorate had fallen below the minimum required and below the quorums prescribed by the articles (15). If however the co-option was not made in the interests of the shareholders, but for other purposes, it could not stand (16).

**986. When a director's office will be vacated** :—The office of a director will be *ipso facto* vacated on happening any of the events provided in s. 283 and in the articles, such as, if he becomes bankrupt or insolvent (17); but this did not prevent a person who was a bankrupt at the time of his appointment from holding the office (18). As to the meaning of the word insolvent see *Sissons v. Sissons* (19). Various facts and admissions showing that the director knows that he cannot meet his liabilities constitute evidence on which the Court may find him to be disqualified under such an article (20). Absence through sickness however is not a disqualification (21).

(7) *James v. Eve* [1873] 6 H.L. 335.

(8) *Moriarty v. Regent Garage Co.* [1921] 2 K.B. 766, 786.

(9) *Plantations Trust v. Billa Rubber Lands* [1916] 85 L.J. Ch. 801, 114 L.T. 676.

(10) *Viswanathan v. Tiffin's B. A. & Paints Ltd.* [1953] M. 520, [1953] 1 M.L.J. 346.

(11) *Blair Open Hearth Furnace Co. v. Reigart* [1913] 108 L.T. 665, 29 T.L.R. 449; but see *Foster v. Foster* [1916] 1 Ch. 532.

(12) *James v. Eve* [1873] 6 H.L. 335.

(13) *Anglo-Austrian P. & P. Union* [1892] 66 L.T. 250, [1892] 2 Ch. 158.

(14) *Anathalakshmi v. Indian Trades & Industries Ltd.* [1953] M. 467, [1953] 1 M.L.J. 275.

(15) *Ibid.*, following *Scottish Petroleum Co.* [1883] 23 Ch. D. 413 and *Bank of Syria* [1900] 2 Ch. 272 on appeal [1901] 1 Ch. 115.

(16) *Ibid.* relying on *Ferguson v. Wilson* [1867] 2 Ch. App. 77 (90) and *G.E. Ry. v. Turner* [1873] 8 Ch. App. 149 (152).

(17) *Bodega Co.* [1904] 1 Ch. 276.

(18) *Dawson v. African Consolidated &c. Co.* [1898] 1 Ch. 6. But see ss 274 and 283.

(19) [1910] 54 S.J. 802.

(20) *London & Counties Assets Co. v. Brighton G. C. Hall* [1915] 2 K.B. 483.

(21) *Mack's Claim* [1900] W.N. 114; *Mc Connell's Claim* [1901] 1 Ch. 728.

If the vacated director's place is not validly filled up at the first or the adjourned meeting, they will continue in office (22). But where no meeting is held during the year, the directors who ought to have retired at the meeting for that year cease to be directors on the expiration of the year (23).

**987. Chairman of the Board of directors :—**If the articles empower the directors to elect chairman and determine the period for which he is to hold office and the directors appoint a chairman, they appoint him for such time as they think fit and there is no contract that he shall remain chairman until he ceases to be director, but it is open to the directors at any time to substitute another chairman at his place (24). See reg. 76 of Table A and notes thereto.

**988. Additional directors :—**One of the articles of a company provided : The directors shall have power at any time, and from time to time, to appoint any other qualified person to be director, either to fill a vacancy or as an addition to the Board but so that the total number of directors shall not at any time exceed the maximum number fixed by the articles and any person so appointed shall retain his office only until the next following meeting, and shall then be eligible for re-election : *held*, the ordinary power of the company in general meeting to appoint additional directors had not been excluded by the articles or association (25). See Reg. 72 of Table A.

**256. Ascertainment of directors retiring by rotation and filling of vacancies.—**(1) At the first annual general meeting of a public company, or a private company which is a subsidiary of a public company, held next after the date of the general meeting at which the first directors are appointed in accordance with section 255 and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is not three or a multiple of three, then, the number nearest to one-third, shall retire from office.

(2) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

(3) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

(4) (a) If the place of the retiring director is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in

(22) *Great N. S. & Chemical Works* [1890] 44 Ch. D. 472 at p. 482.

(23) *Consolidated Nickel Mines* [1914] 1 Ch. 883 (there was a question of remuneration).

(24) *Foster v. Foster* [1916] 1 Ch. 532.

(25) *Topandas v. Yeotmal Electric Supply Co.* [1940] S. 187, 190 I.C. 551, relying on *Worcester Corsetry Ltd. v. Wittings* [1936] Ch. 640.

the next week, at the same time and place, or if that day is a public holiday, till the next succeeding day which is not a public holiday, at the same time and place.

(b) If at the adjourned meeting also, the place of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless—

(i) at that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost ;

(ii) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed ;

(iii) he is not qualified or is disqualified for appointment ;

(iv) a resolution, whether special or ordinary, is required for his appointment or re-appointment in virtue of any provisions of this act ; or

(v) the proviso to sub-section (2) of section 263 or sub-section (3) of section 280 is applicable to the case.

(5) Where a director is to retire at any annual general meeting both in virtue of sub-section (2) and in virtue of sub-section (2) of section 280, he shall be deemed, for the purposes of this section, to retire in virtue of sub-section (2) of this section.

This section is based on regs. 78, 79, 81 and 82 of Table A of the previous Act all of which were compulsory regulations by virtue of s. 17 (2) of that Act—*Notes on Clauses*.

This was originally cl. 240 of the Bill. The latter part of cl. (b) of sub-s. (4) has been completely recast by the Joint Committee so as to bring out the meaning quite clearly (*vide* J.C.R., para 91).

See regs. 89 to 92 of Table A of the English Act of 1948.

**989. Retirement of directors :—**Where besides the governing director and the managing director (who were not to retire according to the articles of association of the company) the number of ordinary directors was reduced to two only, neither of the latter was bound to retire from office at the ordinary general meeting (26).

**990. Effect of failure to hold general meeting :—**Where by the provisions of the articles directors retire from office at an ordinary general meeting, failure to hold such a meeting will prevent their re-election, their retirement dating from the last day in the year in which a general meeting could have been held (27). The word

(26) David Moseley & Sons [1939] 1 Ch. 719.

(27) Consolidated Nickel Mines [1914] 1 Ch. 883. See *Anathalakshmi v. Trades & Investments Ltd.* [1953] M. 467. [1953] 1 M.L.J. 275.

"directors" does not include *de facto* directors or subscribers to the memorandum of association. It applies only to directors who have been duly appointed under the articles (28).

**991. Additional directors :—**Where additional directors were appointed in accordance with provisions similar to those under reg. 85 of Table A of the previous Act, the number of directors of whom a proportion was to retire did not include the additional directors who would hold office until the ordinary general meeting (29).

**992. Recommended by Board :—**If the company could under the articles, only appoint persons recommended by the Board, the recommendation was to be made by a properly constituted Board (30). It was not enough that a majority of the Board being present assented to the appointment (30).

**993. Amendment to resolution :—**Where a notice stated that certain resolutions would be passed "with such amendments as should be determined upon" including a resolution to appoint three named persons as directors, it was competent for the company to add three other persons by way of amendment (31).

**994. Poll :—**At an election of directors, if a poll is demanded, a return of the poll must be taken to be good unless the question is raised before a proper tribunal (32).

**995. Illegal agreement :—**Where under the articles directors are to be appointed at a general meeting, an agreement made by the directors by which directors are to be imposed upon the shareholders by another company is illegal (33).

**996. Intention to propose—written notice :—**Where the articles provided that a member could not be elected a director unless written notice of the intention in that behalf were given to the company not less than 14 days before the day of election of directors, a notice given 14 days before the adjourned meeting was held to be sufficient (34).

**997. Where inapplicable :—**This section does not apply to *de facto* directors (35), nor where no meeting is held at all in breach of the regulations and s. 166 (36).

**998. Where position not filled up :—**If for any reason the first or the adjourned meeting did not proceed validly to fill up the places of the vacating directors, they would continue in office (37). In such a case there was no vacancy to which a successor could be elected (38). At the annual general meeting of a company two retiring directors were, on a show of hands, not re-elected. A poll having been demanded it was decided that the poll should be taken at a later date and that an item providing for the election of two directors to fill up the vacancies should also be dealt with at the later meeting. The retiring directors failed to secure re-election at the later meeting, but the chairman (ignoring the consideration of the item which provided for the filling of the vacancies) declared that they were re-elected under Art 93 of the company's articles of association. The shareholders however then purported to elect the two proposed new directors to fill up the vacancies. In an action brought by the company for a declaration that the two new directors and not the retiring directors had been duly elected : *held*, that as the notice to the shareholders

(28) *John Morley Building Co. v. Barras* [1891] 2 Ch. 386.

(29) *Eyre v. Milton Proprietary Ltd.* [1936] 1 Ch. 244 (C.A.), 154 L.T. 120.

(30) *Barber's case* [1877] 5 Ch. D. 963.

(31) *Bett's & Co. v. Macnaghten* [1910] 1 Ch. 430.

(32) *Wandsworth Gas Co. v. Wright* [1890] 22 L.T. 404.

(33) *James v. Eve* [1873] 6 H.L. 335.

(34) *Catesby v. Burnett* [1916] 2 Ch. 325.

(35) *John Morley Building Co. v. Barras* (supra).

(36) See notes to s. 166.

(37) *Ex p. Kennedy* [1890] 44 Ch. D. 477, 482.

(38) *Holt v. Catterall* [1931] 47 T.L.R. 332.

of the later meeting was not in the proper form the purported election of the proposed new directors was invalid ; but that as Art. 98 only operated when the known circumstances of a particular case were such as sensibly and legitimately to admit of its application, the claim of the retiring directors to have been re-elected was repugnant to common sense and failed (39).

Article 102 of a company provided : "If at any general meeting at which an election of directors ought to take place, the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it should be determined at any such meeting on due notice to reduce the number of directors in office." Held that the appellant, a director who had to retire by rotation and whose place was not filled up nor the number of directors was reduced, was entitled to the declaration that he remained in office until the next ordinary general meeting. It could not be said because the appellant was not re-elected, that fact alone was a determination on due notice to reduce the number of directors in office (40).

**999. S. 42, Specific Relief Act :**—Where the articles provided that the directors should be elected annually at a general meeting, it was held by B. B. Ghose and Garlick JJ. that so long as the general meeting was not held, the directors elected at the previous general meeting would continue in office (41). It was further held in the case that a declaration could not be made under s. 42 of the Specific Relief Act I of 1877 to the effect that the directors elected in a previous year were no longer directors of the company and that all acts done by them were illegal and void, because the plaintiff did not in such a suit claim to be entitled to any legal character or to any rights as to any property which had been denied. It was also held that such a declaration ought not to be made by the Court in the exercise of its discretion (41).

**257. Right of persons other than retiring directors to stand for directorship.**—(1) A person who is not a retiring director shall, subject to the provisions of this Act, be eligible for appointment to the office of director at any general meeting, if he or some member intending to propose him has, not less than fourteen days before the meeting, left at the office of the company a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him as a candidate for that office, as the case may be.

(2) Sub-section (1) shall not apply to a private company, unless it is a subsidiary of a public company.

This section is new. It clearly reaffirms the right of a person to be appointed as director, provided the requisite notice of intention to stand, or propose him as a candidate is given. This section will prevent provisions being inserted in the articles, placing restrictions other than those laid down in the Act in the case of public companies or private companies which are subsidiary of public companies.—*Notes on Clauses.*

See reg. 93 of Table A of the English Act of 1948.

(39) *Robert Batcheller & Sons, Ltd. v. Batcheller* [1945] 1 Ch. 160.

(40) *Grundt v. Great B. P. G. Mines, Ltd.* [1948] L.J.R. 1100, C.A. reversing [1947] 2 A.E.R. 439, a judgment of Wynn-Parry J.

(41) *Kailash v. Jogesh* [1928] C. 868, 32 C.W.N. 1084.

**258. Right of company to increase or reduce the number of directors.**—(1) Subject to the provisions of sections 252, 255 and 259, a company in general meeting may, by ordinary resolution, increase or reduce the number of its directors within the limits fixed in that behalf by its articles.

This section is based on reg. 83 of Table A of the previous Act—*Notes on Clauses*. See reg. 94 of Table A of the English Act of 1948.

Some verbal changes have been made in this section by the Joint Committee.

**1000. Increase of number of directors beyond maximum :**—One article (Art. 109) of a company prescribed a maximum and a minimum number of directors without any qualifying words. Another article (Art. 126) authorised the company in a general meeting from time to time to increase or reduce the number of directors subject to the provisions of s. 83A (1) of the old Act and to alter their qualification and change the order of rotation of the increased or reduced number. The question was whether the power of the company by ordinary resolution to "increase or reduce" the number of directors conferred by Art. 126 was only exercisable within the limits set by the maximum prescribed by Art. 109, and whether a special resolution altering Art. 109 was required: *Held*, after consideration of all the relevant articles that Arts. 126 and 109 were two textually inconsistent provisions. To reconcile them and to give effective content to the opening words of Art. 126 it was necessary to imply some such opening words as "subject to Art. 126" in Art. 109 or "notwithstanding anything contained in Art. 109" in Art. 126. In this view the company had power to increase the number of directors beyond the maximum prescribed by Art. 109, by an ordinary resolution, and consequently a special resolution altering Art. 109 for the purpose was not required (42).

**259. Increase in number of directors to require Government sanction.**—In the case of a public company or a private company which is a subsidiary of a public company, any increase in the number of its directors, except—

(a) in the case of a company which was in existence on the 21st day of July, 1951, an increase which was within the permissible maximum under its articles as in force on that date, and

(b) in the case of a company which came or may come into existence after that date, an increase which is within the permissible maximum under its articles as first registered,

shall not have any effect unless approved by the Central Government; and shall become void if, and in so far as, it is disapproved by that Government.

This section is new. It has been inserted by the Joint Committee with the following observation: "This clause reproduces s. 86J (1) (b) of the existing Act. That section was included in the Bill as introduced in Schedule XI and was consequently intended to be in operation only for a period of three years—*vide* original clause

(42) *Ram Kissendas v. Satya Charan* [1950] P.C. 81 reversing 50 C.W.N. 310 on this point.

598. The Committee consider that this provision, like most of the other provisions in Schedule XI of the original Bill should be placed permanently on the Statute Book, especially in view of the continuance of the managing agency system. It has effectively prevented abuses in the past and the Committee consider it both desirable and necessary to keep it" (*vide* J. C. R., para 92).

As to the form of application under this section to the Central Government for increasing the number of directors, see Form No. 24 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**260. Additional directors.**—Nothing in section 255, 258 or 259 shall affect any power conferred on the Board of directors by the articles to appoint additional directors :

Provided that such additional directors shall hold office only up to the date of the next annual general meeting of the company :

Provided further that the number of the directors and additional directors together shall not exceed the maximum strength fixed for the Board by the articles.

This new section has also been inserted by the Joint Committee with the following remark: "This clause corresponds to original clause 242 (2). It is necessary to make a reference in this clause not only to clauses 254 (now s. 255) and 257 (now s. 258) but also to clause 258 (now s. 259). In the first proviso, the reference to the 'next general meeting' has been altered into a reference to the 'next annual general meeting'" (*vide* J. C. R., para 93).

Compare Reg. 85 of the old Table A and see reg. 72 of Table A and notes thereto.

**1000A. Co-option of directors** :—The power to co-opt director did not come to an end only because an annual general meeting was directed by the Court to be held under sub-s. (3) of s. 76 of the old Act (43). The power to co-opt a director might be exercised notwithstanding that the strength of the directorate had fallen below the minimum (43). But if the co-option was not made in the interests of the shareholders, but for other purposes, it could not stand (43). The decision on the validity of the co-option was incidental to the exercise of the powers under sub-s. (3) of s. 76 of the old Act (43).

**261. Certain persons not to be appointed directors, except by special resolution.**—(1) If a public company, or a private company which is a subsidiary of a public company, has a managing agent and such managing agent is authorised by the articles or by an agreement to appoint any director to the Board, none of the following persons shall be appointed

(43) *Ananthalakshmi v. Indian Traders etc. Ltd.* [1953] M. 467, 66 M.L.J. 71 (2), 1953 M.W.N. 83, [1953] 1 M.L.J. 275. See also *Scottish Petroleum Co.* [1883] 23 Ch. D. 413; *Bank of Syria* [1900] 2 Ch. 272 on appeal [1901] 1 Ch. 115; *Ferguson v. Wilson* [1867] 2 Ch. App. 77 (90) and *G. E. Ry. v. Turner* [1873] 8 Ch. App. 149 (152).

as a director of the company whose period of office is liable to determination by retirement of directors by rotation, except by a special resolution passed by the company :—

(a) any person who is an officer or employee of, or who holds any office or place of profit under, the company or any subsidiary thereof :

Provided that nothing in this clause shall apply to the director of such company or subsidiary, or to the holder of any office or place of profit under such company or subsidiary which may be held by a director of the company by virtue of section 314 ;

(b) where any office or place of profit which would disqualify a person under clause (a), read with the proviso thereto, is held by any firm, any partner in, or employee of, the firm ;

(c) where any such office or place of profit is held by a private company, any member, officer or employee of such company ;

(d) where any such office or place of profit is held by a body corporate, any officer or employee of such body corporate ;

(e) any person who is entitled, by virtue of any agreement, to any share of, or any amount out of, the remuneration received by the managing agent ;

(f) any associate, or officer or employee, of the managing agent ; or

(g) any person who is an officer or employee of, or who holds any office or place of profit under, any body corporate under the management of the managing agent or any subsidiary of such body corporate :

Provided that nothing in clause (g) shall apply to the director of such body corporate or subsidiary or to the holder of any office or place of profit under such body corporate or subsidiary which may be held by a director of such body corporate by virtue of section 314.

(2) Special notice shall be required of any resolution appointing, or approving the appointment of, any person referred to in clauses (a) to (g) of sub-section (1), as a director of the company.



(3) The notice given to the company of any such resolution, and the notice thereof given by the company to its members, shall set out the reasons which make the resolution necessary.

(4) Nothing in this section shall be deemed to prevent any director holding any office immediately before the commencement of this Act from continuing to hold that office up to the next annual general meeting of the company.

This section is new. It is based on the recommendation of the C. L. C. and the provisions of sub-s. (2) (iii) of new section 83B at pages 356 and 357 of the Report. The C. L. C. recommended that there should be a majority of not less than 80 per cent. before the persons who are connected with the managing agent in the manner specified in this section are appointed directors in vacancies which are subject to retirement by annual rotation. It is considered that a special resolution, that is to say, a resolution passed by not less than three-fourths of the votes cast at a meeting will suffice in this case also. The Act requires a special resolution in various places and there is no special reason to distinguish this case from those cases. The exceptions contained in the provisos to paras (a) and (j) of sub-s. (1) are obviously necessary—*Notes on Clauses*.

Some alterations have been made in this section by the Joint Committee.

In this section in sub-s. (1) the words "or by an agreement" have been inserted after the words "authorised by the articles" and cl. (f) thereof has been replaced by the new cl. (f) by the Lok Sabha.

## 262. Filling of casual vacancies among directors.—(1)

In the case of a public company or a private company which is a subsidiary of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office will expire in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of directors at a meeting of the Board.

(2) Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated as aforesaid.

This section is based on reg. 84 (85 wrongly put in Notes on Clauses) of Table A of the previous Act and sub-section (2) (i) of s. 83B as redrafted by the C. L. C. (see page 356 of the Report). Comprehensive provision has been made for all the different cases which may arise—*Notes on Clauses*. Compare reg. 95 of Table A of the English Act of 1948.

Some alterations have been made in this section too by the Joint Committee. See notes to s. 255.

1001. The election of a person as a director by the directors entitles him to hold office till the next general meeting, while if he is elected at a general meeting, he is entitled to hold office for three years (44).

1002. As to what are casual vacancies see the case noted below (45).

A casual vacancy means in general any vacancy occurring by death, resignation or bankruptcy and not by effluxion of time (46).

A casual vacancy may be filled up either by the directors or by the general meeting (47).

**263. Appointment of directors to be voted on individually.**—(1) At a general meeting of a public company or of a private company which is a subsidiary of a public company, a motion shall not be made for the appointment of two or more persons as directors of the company by a single resolution, unless a resolution that it shall be so made has first been agreed to by the meeting without any vote being given against it.

(2) A resolution moved in contravention of sub-section (1) shall be void, whether or not objection was taken at the time to its being so moved :

Provided that where a resolution so moved is passed, no provision for the automatic re-appointment of retiring directors in default of another appointment shall apply.

(3) For the purposes of this section, a motion for approving a person's appointment, or for nominating a person for appointment, shall be treated as a motion for his appointment.

This section is new. It is based on para 85 of the C. L. C. R. and sub-s. (3) of s. 83B of the redraft at page 357 of the Report and also s. 183 of the English Act of 1948—*Notes on Clauses*.

**264. Consent of candidate for directorship to be filed with Registrar.**—(1) A person who is not a retiring director shall not be capable of being appointed director of a company unless he has, by himself or by his agent authorised in writing, signed and filed with the Registrar, a consent in writing to act as such director.

(2) Sub-section (1) shall not apply to a private company unless it is a subsidiary of a public company.

This section also is new. It is based on the second sub-para of para 86 of the C. L. C. R. See also recommendation (ii) at page 255 of that Report—*Notes on Clauses*.

**265. Option to company to adopt proportional representation for the appointment of directors.**—Notwithstanding anything contained in this Act, the articles of a

(45) *Compagnie de Mayville v. Whitley* [1896] 1 Ch. 788.

(46) *Srinivasan v. Watrap* [1952] M. 100; *Albert Mills Co.* [1872] 9 Bom. H.C.R. 438.

(47) *Munster v. Cammel Co.* [1882] 21 Ch. D. 183, 188; *1st of Wight Ry. Co. v. Tahourdin* [1883] 25 Ch. D. 320.

company may provide for the appointment of not less than two-thirds of the total number of the directors of a public company or of a private company which is a subsidiary of a public company, according to the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise, the appointments being made once in every three years and interim casual vacancies being filled in accordance with the provisions, *mutatis mutandis*, of section 262.

This new section has been introduced by the Joint Committee with the following observation: "This clause deals with a very important matter which was discussed at length and on more than one occasion by the Joint Committee. On the one hand, it was represented to the Committee that under the present system of voting a majority of 51 per cent. or more of the shareholders was able to monopolise all the directorships with the result that even a respectable minority of the shareholders could not get even one of their representatives into the directorate. Consequently, they had no means of knowing how the affairs of the company were being managed and this fact handicapped the minority in asserting its legitimate rights and for the exercise of which rights machinery has been provided in the Bill—see for instance clauses 396 to 406 (now ss. 397 to 407). *Per contra* it was urged that the adoption either of cumulative voting or of any other form of proportional representation might result in the Board of directors becoming a contending field for warring factions and that the smooth working of the business of the company might be rendered virtually impossible. Clause 264 (now s. 265) as drafted by the Joint Committee steers a middle course. The provision for the annual renewal of one-third of the directorate by the ordinary method of voting will operate normally. A company will however, have power if it so desires, to adopt any form of proportional representation by making provision in that behalf in its articles. The Committee feel that this is a matter which is best left to the shareholders of the company. As no form of proportional representation can work on the basis of an annual renewal of a portion of the directorate the election has been made triennial. Interim vacancies will be filled in the manner provided in Clause 261 (now s. 262) for the filling of casual vacancies under the ordinary system of voting" (*vide* J. C. R., para 94).

**266. Restrictions on appointment or advertisement of director.**—(1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in a prospectus issued by or on behalf of the company, or as proposed director of an intended company in a prospectus issued in relation to that intended company, or in a statement in lieu of prospectus filed with the Registrar by or on behalf of a company, unless, before the registration of the articles, the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has, by himself or by his agent authorised in writing,—

(a) signed and filed with the Registrar a consent in writing to act as such director; and

(b) either—

(i) signed the memorandum for shares not being less in number or value than that of his qualification shares, if any ; or

(ii) taken his qualification shares, if any, from the company and paid or agreed to pay for them ; or

(iii) signed and filed with the Registrar an undertaking in writing to take from the company his qualification shares, if any, and pay for them ; or

(iv) made and filed with the Registrar an affidavit to the effect that shares, not being less in number or value than that of his qualification shares, if any, are registered in his name.

(2) Where a person has signed and filed as aforesaid an undertaking to take and pay for his qualification shares, he shall, as regards those shares, be in the same position as if he had signed the memorandum for shares of that number or value.

(3) References in this section to the share qualification of a director or proposed director shall be construed as including only a share qualification required within a period determined by reference to the time of appointment, and references therein to qualification shares shall be construed accordingly.

(4) On the application for registration of the memorandum and the articles, if any, of a company, the applicant shall file with the Registrar a list of the persons who have consented to be directors of the company ; and, if this list contains the name of any person who has not so consented, the applicant shall be punishable with fine which may extend to five hundred rupees.

(5) This section shall not apply to—

(a) a company not having a share capital ;

(b) a private company ;

(c) a company which was a private company before becoming a public company ; or

(d) a prospectus issued by or on behalf of a company after the expiry of one year from the date on which the company was entitled to commence business.

This section is based on s. 84 of the previous Act and s. 181 of the English Act of 1948—*Notes on Clauses.*

Some alterations have been made in this section by the Joint Committee.

**1002A.** This section applies to companies which invite the public to take shares, and probably does not apply to a prospectus sent to the existing shareholders only (48).

The result of non-compliance of sub-sec. (1) is not stated. Probably the appointment is void and the person responsible is liable in damages.

**1003. What is good payment:—**The shares to be taken by a director need not be paid for in cash. Any honest payment in money's worth is a good payment (49). A person who acts as a director is sometimes deemed to have agreed to take his qualification shares (50).

As to the form of consent to act as director of a company, see Form No. 29 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms 1956—printed as Appendix B.

For the form of list of persons who have consented to be directors under sub-s. (4) of this section, see Form No. 30 *ibid*.

For the form of undertaking to take and pay for qualification shares under sub-s. (1) (b) (iii) of this section, see Form No. 31 *ibid*.

### *Managing Directors, etc.*

**267. Certain persons not to be appointed managing directors.**—No company shall, after the commencement of this Act, appoint or employ, or continue the appointment or employment of, any person as its managing or whole-time director who—

(a) is an undischarged insolvent, or has at any time been adjudged an insolvent ;

(b) suspends, or has at any time suspended, payment to his creditors, or makes, or has at any time made, a composition with them ; or

(c) is, or has at any time been, convicted by a Court in India of an offence involving moral turpitude.

This new section has been inserted by the Joint Committee with the following observation: "This is based on original clause 295 of the Bill as introduced which applies to managers (*vide* clause 385). The Committee feel that the provision should be stiffer in the case of the managing director than in the case of a manager and have therefore omitted the provision found in original clause 295(2) for the removal of the disqualification imposed by the clause. The limitation of the disqualification to a period of five years has also been removed (*vide* J. C. R., para 95).

In sub-s. (1) of this section the words "managing or whole-time director" have been inserted by the Lok Sabha.

See notes to cl. (26) of s. 2 *ante*.

**268. Amendment of provision relating to managing, whole-time or non-rotational directors to require Government approval.**—In the case of a public company or a private company which is a subsidiary of a public company, an amend-

(48) *Burrows v. Matabele Gold Co.* [1901] 2 Ch. 23 at p. 27.

(49) *Star Steam Laundry Co. v. Dukas* [1913] W.N. 39, 29 T.L.R. 269.

(50) *Dey v. Pullinger Engineering Co.* [1921] 1 K.B. 77, overruling *Premier Industrial Bank v. Carlton Manufacturing Co.* [1909] 1 K.B. 106.

For the form of consent to act as director under this section see Form No. 29 in

ment of any provision relating to the appointment or re-appointment of a managing or whole time director or of a director not liable to retire by rotation, whether that provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or by its Board of directors, shall not have any effect unless approved by the Central Government ; and the amendment shall become void if, and in so far as, it is disapproved by that Government.

SS. 268 and 269 have also been inserted by the Joint Committee with the following observation : "These clauses also, like new clause 258 (now s. 259) reproduce provisions of the existing Act which were included in Schedule XI of the Bill as introduced. The provisions contained in these clauses will therefore be in operation permanently instead of for a period of three years only, as proposed in the Bill as introduced (*vide* J. C. R., para 96).

In this section the words "managing or whole time director" have been inserted by the Lok Sabha.

See notes to s. 259.

As to the form of application to the Central Government under this section and ss. 269, 326 and 379 see Form No. 25 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**269. Appointment of managing or whole-time director to require Government approval.**—In the case of a public company or a private company which is a subsidiary of a public company, the appointment of a managing or whole-time director for the first time after the commencement of this Act in the case of an existing company, and after the expiry of three months from the date of its incorporation in the case of any other company, shall not have any effect unless approved by the Central Government ; and shall become void if, and in so far as, it is disapproved by that Government.

See notes to the last section and to s. 2 (26).

In this section also the words "managing or wholetime director" have been inserted by the Lok Sabha.

As to the form of application to the Central Government under this section, see notes to s. 268.

### *Share qualification*

**270. Time within which share qualification is to be obtained and maximum amount thereof.**—(1) Without prejudice to the restrictions imposed by section 266, it shall be the duty of every director who is required by the articles of the company to hold a specified share qualification and who is not already qualified in that respect, to obtain his qualification within two months after his appointment as director.

(2) Any provision in the articles of the company (whether made before or after the commencement of this Act) shall be void in so far as it requires a person to hold the qualification shares before his appointment as a director or to obtain them within a shorter time than two months after his appointment as such.

(3) The nominal value of the qualification shares shall not exceed five thousand rupees, or the nominal value of one share where it exceeds five thousand rupees.

(4) For the purpose of any provision in the articles requiring a director to hold a specified share qualification, the bearer of a share warrant shall not be deemed to be the holder of the shares specified in the warrant.

This section corresponds to s. 85 of the previous Act and s. 182 of the English Act of 1948. See the recommendation of the C. L. C. in para 86 of their Report. The recommendation of the C. L. C. that the qualifying shares should be held beneficially by a director may lead to difficulties in practice. Such a requirement is not imposed by the English Act. It is therefore considered desirable to omit that requirement. Where the requisite shares are held in the name of a person, it seems unnecessary to go behind that fact and enquire whether he holds the share solely and beneficially for himself. Sub-s. (2) of the redraft of s. 85 suggested at page 35<sup>9</sup> of the C. L. C. R. has therefore been omitted—*Notes on Clauses*.

**1004. Agreement to take qualification shares** :—Unless the articles require it, a director need not hold any qualification ; for there is nothing in the Act making obligatory on a director to hold shares (51). Even where the articles require a qualification, they may be amended so as to enable persons to be directors without any share qualification (52). Where the articles require a director to have a share qualification, the fact of a person becoming a director may be evidence of an agreement to take the qualification shares (53). But see the under-noted cases (54) where it has been held that merely acting as a director, or accepting the office and his continuing to act after the time by which the qualification ought to have been acquired does not amount to a contract to take the shares. The prospectus is not a satisfactory proof of an agreement binding the company to allot and the director to accept such shares (55). In the last cited cases the director was held not liable either on the ground of agreement or on the ground of estoppel. Merely accepting office of a director and acting as such do not constitute an agreement to become a member, but only a contract to qualify by taking the required shares within the time specified in the articles and if no time is specified within a reasonable time (56). As to the lapse of a reasonable time to take the qualification shares, see *Portuguese C. C. Mines* (57). The lapse of time within which the director is bound to qualify only amounts to an offer to take shares and no agreement to take them exists until the

(51) Buckley 11th ed. p. 392 ; *Peoples' Bank of N. India*, [1933] L. 51, 140 I.C. 128.

(52) *Peoples Bank of N. India* (supra).

(53) *Portal v. Emmens* [1875] 1 C.P.D. 664 (C.A.) ; *Isaac's case* [1892] 2 Ch. 158 ; *Hercynia Copper Co.* [1894] 2 Ch. 403.

(54) *Metropolitan & Co.* [1873] 9 Ch. App. 102 ; *Whical Butter Consols* [1888] 38 Ch. D. 42 ; *Jenner's case* [1877] 7 Ch. D. 132.

(55) *De Ruvigni's case* [1876] 5 Ch. D. 306 ; *People's Bank of N. India* (supra).

(56) *In re Issue Co.* [1895] 1 Ch. 226.

(57) [1891] 3 Ch. 28.

offer has been accepted, e.g., by placing the director on the register, by resolving to allot the shares to him or by so acting as to show that he has assumed that his offer has been accepted and by both parties acting on that assumption. Mere lapse of time will not turn the offer into a contract, and there is no contract unless the offer is accepted before the company goes into liquidation (56). Where the person attended meetings of directors but the qualification shares were not allotted to him and shortly after the company went into liquidation, it was held that no reasonable time having elapsed at the commencement of the winding up for performing the agreement (assuming there was one) to take the qualification shares consequently, he could not be held liable as contributory for the shares (58). Where the articles do not require such a qualification and the directors pass a resolution fixing the qualification, a director who is afterwards elected and act in that capacity does not thereby enter into an implied contract to take or hold the qualification shares (55). The prospectus is not a satisfactory proof of an agreement binding the company to allot and the directors to accept such shares (59). The articles can be altered under s. 31 *ante* so as to include non-shareholders as directors (55).

Where a person has been given shares or shares have been transferred to him as qualification for his directorship, he becomes a member of the company; and if such person hold out that he is a shareholder, he is estopped from denying that he is one (when the company goes into liquidation) on the ground that the transfer was a colourable transaction (60). Where there was an agreement by a firm to take 100 shares for being appointed agents of the company and a member of the firm signed the memorandum of association for that number of shares as qualification, it was held on facts that there was only one agreement and the allotment of shares to the firm was a satisfaction of the member's signature to the memorandum and also of the qualification as a director (61).

**1005. How they are to be taken** :- Shares taken as a qualification need not be taken from the company, unless the director is named in the articles (62). It is enough if they are taken in the open market or from a friend (63). They even need not be shares for which the qualifying director has paid (64). Even beneficial ownership is not necessary (65). The registered holder of the shares, though he has transferred them to another is eligible (65). Shares taken as a present from the promoters is a breach of trust (66), and the director must account to the company for the amount (67); but he is nevertheless qualified (68). The bearer of a share warrant may be a member, if the articles so provided, but he shall not be qualified (69).

The holding of shares as one of several joint holders constitutes a good qualification (70), unless the articles require a sole holding (71). If the holding of shares is a condition precedent, the election of an unqualified director is void and he may

(58) *Hewitt's case* [1882] 25 Ch. D. 283, (C.A.).

(59) *Peoples Bank of N. India* (supra).

(60) *Mulk Raj v. Peoples Bank of N. India* [1936] L. 480, 38 P.L.R. 816.

(61) *Dunster's case* [1894] 3 Ch. 473.

(62) *Brown's case* [1873] 9 Ch. App. 102; *Carling's case* [1875] 1 Ch. D. 115.

(63) *Metropolitan &c. Co.* [1873] 9 Ch. App. 102; *Nusseervanji's case*, infra.

(64) *Nusseervanji's case* [1889] 13 Bom. 1.

(65) *Grundy v. Briggs* [1910] 1 Ch. 444; *Dunster's case* [1894] 3 Ch. 473; *Dover Coal-fields Extension Co.* [1907] 2 Ch. 76, [1908] 1 Ch. 65; *Pulbrook v. Richmond C. Mining Co.* [1878] 9 Ch. D. 610.

(66) *Eden v. Ridsdale's Ry. Lamp Co.* [1889] 23 Q.B.D. 368.

(67) *Hay's case* [1875] 10 Ch. App. 593.

(68) *Carling's case* [1875] 1 Ch. D. 115; *Innes & Co.* [1903] 2 Ch. 254; *Hercynia Copper Co.* [1894] 2 Ch. 403.

(69) S. 115 and sub-s. (4) of the present section.

(70) See note (65) (supra).

(71) *Dunster's case* [1894] 3 Ch. 437 at p. 478.



by acting incur liabilities (74). But where it is not a condition precedent, he may act before he acquires the qualification shares (73). The ceasing to hold the qualification shares involves vacation of office (74).

**1006. Holding qualification shares in trust for promoters:**—If a director accepts and holds the necessary shares in trust for the promoters, he will be liable to pay up the amount of his qualification (75). It is a misfeasance for the directors to hold such shares as this puts them entirely at the mercy of the promoters. The measure of damages in such cases will be the highest value of the shares during their holding (75).

The qualification must be obtained within two months after the appointment (76).

**1007. Qualification not lost by mortgage of shares:**—The qualification of a director will not be lost by a mortgage of the shares (77). Where the articles provided the qualification of the director should be the "holding in his own right" 300 shares, the meaning of this phrase was that he must not only have the legal right to deal with them, but must have the beneficial ownership in them, although he may still be the beneficial owner if he has mortgaged the shares (78).

**1008. Not qualified before registration:**—Where transfers to the directors of their qualification shares were passed at a Board meeting and they were forthwith elected as directors, though the transfers were actually registered on a subsequent date, it was held by Astbury J. that before their appointment the transferees had acquired an absolute right to registration, but they were not qualified persons before actual registration and their appointment as directors was invalid (79).

**1009. Qualification:**—A company cannot alter the qualification for its directors except by passing a special resolution (80). A director must hold his qualification shares in such a way that the company may safely deal with him as owner of the shares (81). Shares held jointly with any other person may be a sufficient qualification (82). A director who is entered on the register as holder of shares as liquidator of another company is not qualified (83).

**1010. Additional qualification:**—There is nothing in the policy of the Act or in its language which prohibits additional or different qualifications for directorship apart from the holding of shares. Thus a special resolution passed by a bank providing for holding of a fixed deposit of Rs. 1,000 as an additional qualification for a director is entirely *intra vires* and legal (84).

For other cases see notes s. 266.

**1011. Increase of qualification:**—If after a director has acquired his qualification shares the qualification is increased he does not vacate office for not acquiring

(72) *International Cable Co.* [1892] W.N. 34, 66 L.T. 253, 8 T.L.R. 316; *Brown & Green Ltd. v. Hays* [1920] 36 T.L.R. 330.

(73) *Hamley's case* [1877] 5 Ch. D. 705.

(74) *Chandra Bhan v. Emp.* [1914] 23 I.C. 748, 15 Cr. L.J. 380.

(75) *London & S. W. Canal Co.* [1911] 1 Ch. 346.

(76) See *London & S. W. Canal Co.* [1911] 1 Ch. 346.

(77) *Cumming v. Prescott* [1837] 2 Y. & C. 488.

(78) *Cooper v. Griffin* [1892] 1 Q.B. 740 (754); *Bainbridge v. Smith* [1889] 41 Ch. D. 462—per Colton L. J.

(79) *Spencer v. Kennedy* [1926] Ch. 125.

(80) *Navnital v. Scindia Steam Navigation Co.* [1927] Bom. 609, 29 Bom. L.R. 1362; see also *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361.

(81) *Sutton v. English & Colonial Co.* [1902] 2 Ch. 502.

(82) *Grundy v. Briggs* [1901] 1 Ch. 444.

(83) *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 148.

(84) *Saraswati & Co. Nidhi Ltd. v. Daivasigamani* [1951] 1 M.L.J. 18.

them (85). A director acting without acquiring shares is entitled to the remuneration prescribed in the articles (86).

**1012.** The High Court has no jurisdiction to take cognizance of and try an offence under this or any other section of the Act (87). See notes under ss. 622 to 624.

**1013.** When summary proceedings are commenced against a director he can apply to the Court which hears the case for relief under s. 633 *post* (88). See notes to that section.

**271. Filing of declaration of share qualification by director.**—Every director, not being a technical director or a director appointed by the Central or a State Government, shall within two months after his appointment, or in the case of a director holding office at the commencement of this Act, within two months after such commencement, file with the company a declaration specifying the qualification shares held by him.

This section is new. It is based on sub-s. (3) of the redraft of s. 85 at page 358 of the C. L. C. R.—*Notes on Clauses*.

**272. Penalty.**—If, after the expiry of the said period of two months, any person acts as a director of the company when he does not hold the qualification shares referred to in section 270, he shall be punishable with fine which may extend to fifty rupees for every day between such expiry and the last day on which he acted as a director.

This section also is new. It is based on sub-s. (4) of C.L.C.'s redraft of s. 85 mentioned above—*Notes on Clauses*.

**273. Saving.**—Sections 270 to 272 shall not apply to a private company, unless it is a subsidiary of a public company.

This section is based on sub-s. (5) of C.L.C.'s redraft of s. 85 mentioned above—*Notes on Clauses*.

### *Disqualifications of Directors*

**274. Disqualifications of directors.**—(1) A person shall not be capable of being appointed director of a company, if—

(a) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force ;

(85) *Molineaux v. London &c. Insurance Co.* [1902] 2 K.B. 589.

(86) *New Beeston Cycle Co.* [1899] 1 Ch. 775. But see *Exp. Barkinshaw* [1904] 2 K.B. 327.

(87) *Harish v. Kavindra* [1936] A. 830 (F.B.), [1936] A.I.J. 1105.

(88) *In re Gilt Edge Safety Glass, Ltd.* [1940] Ch. 495.

(b) he is an undischarged insolvent ;

(c) he has applied to be adjudicated as an insolvent and his application is pending ;

(d) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months, and a period of five years has not elapsed from the date of expiry of the sentence ;

(e) he has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call ; or

(f) an order disqualifying him for appointment as director has been passed by a Court in pursuance of section 203 and is in force, unless the leave of the Court has been obtained for his appointment in pursuance of that section.

(2) The Central Government may, by notification in the Official Gazette, remove—

(a) the disqualification incurred by any person in virtue of clause (d) of sub-section (1), either generally or in relation to any company or companies specified in the notification ; or

(b) the disqualification incurred by any person in virtue of clause (e) of sub-section (1).

(3) A private company which is not a subsidiary of a public company may, by its articles, provide that a person shall be disqualified for appointment as a director on any grounds in addition to those specified in sub-section (1).

This section lays down initial disqualifications corresponding to disqualifications which under s. 861 and reg. 77 of Table A of the previous Act, entail the vacation of office by a director. Sub-s. (2) takes power to remove any disqualification arising from conviction or from failure to pay calls. Sub-s. (4) corresponds to s. 861 (2) of the previous Act. It is considered necessary to confine the power of a company to add to the disqualifications imposed by the Act to private companies which are not subsidiaries of public companies—*Notes on Clauses*. Compare s. 86A of the previous Act.

Alterations have been made in this section by the Joint Committee with the following observation. “*New sub-clause (1) (c)*—Where a person voluntarily applies to be adjudicated as an insolvent, the Committee consider it necessary to disqualify him for appointment as director forthwith, and that in such cases it is hardly necessary to wait until the application results in a formal adjudication. New sub-clause (c) has accordingly been added to this clause.

“*New sub-clause (1) (d)*—The Bill as introduced provided for two disqualifications based on conviction for a criminal offence, namely,

- (a) conviction for a non-bailable offence, irrespective of the sentence imposed; and
- (b) conviction for any other offence resulting in a sentence of imprisonment for not less than two years.

A definition of 'non-bailable offence' was also necessary—See sub-clause (g) of the original clause. The Committee consider that it is unnecessary to have two varying disqualifications based upon the non-bailable or bailable character of the offence. In the opinion of the Committee, the true criterion is the sentence. The Committee have accordingly provided that disqualification for any offence (whether it be bailable or non-bailable) resulting in a sentence of imprisonment for not less than *six months* (as against the two years provided in the Bill as introduced in the case of non-bailable offence) should disqualify a person from appointment as a director. Sub-clauses (1) (c) and (d) of the Bill as introduced have therefore been combined into a single sub-clause, sub-clause (d), and sub-clause (3) of the Bill has been omitted" (*vide* J.C.R., para 97).

**1014. Directors appointed for a definite period :—**A company whose directors are appointed for a definite period has no inherent power to remove them before the expiration of that period. If the articles contain no power to remove directors before the expiration of their period of office, if they authorize the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give power to remove directors before a resolution can be passed to remove any of them (89).

**1015. Resignation :—**Subject to the articles of association a director is entitled to resign his office and cannot withdraw his resignation without the company's consent (90). After his resignation has been accepted by the Board, a director ceases to be liable for any report made or dividend declared, even though he be named as a director in the report (91). Where the articles provide that the office of a director should *ipso facto* be vacated if by notice in writing to the company he resigns his office, oral resignation is sufficient. "I see no reason in law," observed Bennett J., "why the contract of service between the company and its directors should not be terminated by the same means as that by which the contract of service between two individuals may be terminated, and I see no ground in law for saying that where a written contract has been made for service which requires a written notice on either side before it can be terminated, it cannot be terminated by word of mouth by mutual consent between the parties" (92).

Where the articles of a bank declared that the office of a director shall *ipso facto* be vacated "if he resigns, or for any other reason becomes incapable of acting as a director", it was held that the articles contemplated resignation or some incapacity, such as illness, long absence, imprisonment, insanity, or any other incapacity. A director's indebtedness to the bank could not be said to be incapacity within the article and therefore was no ground for his removal (93). Moreover loan to directors of a bank was a part of its business (94).

**1016. Removal :—**The rule for the removal of a director framed by the directors under one of the company's articles which is procedural only is *ultra vires*. When the removal of a director was already provided for in one of the articles which required an extraordinary resolution of the company, the directors must act in ac-

(89) *Towers v. African Tug Co.* [1904] 1 Ch. 558.

(90) *Glossop v. Glossop* [1907] 2 Ch. 370, 374-75.

(91) *National Bank of Wales* [1899] 2 Ch. 629; in H.L. *sub nom. Dovey v. Cory* [1901] A.C. 477.

(92) *Latchford Premier Cinema v. Ennion* [1931] 2 Ch. 409 (410).

(93) *Albuquerque v. Catholic Bank* [1912] M. 737, [1942] 2 M.L.J. 307, 55 M.L.W. 532.

(94) *Ibid*: see s. 295.

cordance with that article and cannot rely upon the rule which is *ultra vires* in support of the removal of a director (93).

**1017. Absence from Board meeting :—**Where the articles provide that a director's office will be vacated on his absenting himself from Board meetings for a certain period, the expression "absenting himself" means being absent voluntarily or deliberately (95). Time does not begin to run until a meeting has been held which he should have attended (96).

**1018. Happening of a specified event :—**Where the articles provide that a director shall vacate his office on the happening of a specified event, the office falls vacant on the happening of such an event and the company cannot waive the event or condone the act (97).

**1019. Insolvency :—**In order that a director should be insolvent within the meaning of this section it is not necessary that there should be a definite act of insolvency done on a particular day from which it can be said that the insolvency dates ; it is sufficient if there is evidence from which the Court can find that the director is insolvent (98). If a director becomes financially insolvent and asks his creditors to accept a composition, he is to be regarded as an insolvent within the meaning of the section (99).

**1020. Holding any other office of profit :—**Where the articles provide that a director should *ipso facto* vacate his office if he accepted or held any other office under the company except that of the managing director or manager, a resolution appointing two of the directors to act as solicitors of the company did not disqualify them (1). But if a director hold the office of a paid trustee of a debenture deed, that will disqualify him (2). A secretary, if elected as a director, may act as such if he ceases to receive the salary of the post of secretary (3).

**1021. Participation in profit of a contract :—**In the absence of a provision in the articles a director is precluded from partaking in any benefit from a contract which requires the sanction of his Board (4), and if he makes any profit he must account to the company (4). It makes no difference that the profit is one which the company itself could have obtained (5).

**1022. Meaning of "profits" :—**As to the meaning of the expression "profits of any contract" see the cases noted below (6). A director's office is vacated if he is concerned in any such contract, although no profits arise therefrom (7). A director is entitled to be heard on the question whether his office has been vacated (8).

(95) Mack's Claim [1900] W.N. 114.

(96) Mc Connell's Claim [1901] 1 Ch. 728.

(97) Bodega Co. [1904] 1 Ch. 276.

(98) London & Counties Assets Co. v. Brighton &c. Picture Palace [1915] 2 K.B. 493 ; Harold Sissons & Co. v. Sissons [1901] 54 S.J. 802.

(99) James v. Rockwood Colliery Co. [1912] W.N. 263, 28 T.L.R. 215, 106 L.T. 128.

(1) Harper's Ticket Issuing Co. [1912] W.N. 263, 29 T.L.R. 63.

(2) Astley v. New Tivoli [1899] 1 Ch. 151.

(3) Iron Ship Coating Co. v. Blunt [1868] 3 C.P. 484.

(4) Imperial M. C. Assn. v. Coleman [1870] 6 Ch. App. 558, 566, on appeal 6 H.L. 189 ; Gluckstein v. Barnes [1900] A.C. 240.

(5) Boston &c. Co. v. Ansell [1888] 39 Ch. D. 339 ; Erskine v. Sacks [1901] 2 K.B. 504, 517. Contrast Jubilee Cotton Mills [1923] 1 Ch. 1 ; see also Transvaal Lands Co. v. New Belgium Co. [1914] 2 Ch. 488.

(6) Todd v. Robinson [1885] 14 Q.B.D. 739 ; Bodega Co. [1904] 1 Ch. 276 ; Cory v. Harrison [1906] A.C. 274 ; Norton v. Taylor [1906] A.C. 378 ; Holden v. Southwork Corp'n. [1921] 1 Ch. 550.

(7) Star Steam Laundry v. Dukas [1919] W.N. 99, 108 L.T. 367.

(8) Turnbull v. West Riding Club [1894] W.N. 4, 70 L.T. 92.

**1023. When does the disqualification cease :—**The disqualification ceases as soon as the transaction is completed, and the director may be re-elected (9).

**1024. Punishment in a criminal case :—**Where the articles of a company provided that a director "convicted of an indictable offence" should vacate his office, the defendant, a director, pleaded guilty of an offence before a Court of summary jurisdiction and was convicted: *Held* by the Court of Appeal that whether or not an offence was indictable within the meaning of the company's articles depended on the nature and quality of the offence when committed irrespective of the procedural manner in which it might subsequently be dealt with (dealt with under summary jurisdiction) and therefore as the offence of which the director was convicted was one which could be dealt with on indictment, he was convicted of an "indictable offence" within the meaning of the articles and the company was entitled to the declaration that the director had vacated his office and had been disqualified (10).

### *Restrictions on number of directorships*

**275. No person to be a director of more than twenty companies.—**After the commencement of this Act, no person shall, save as otherwise provided in section 276, hold office at the same time as director in more than twenty companies.

SS. 275 to 279 are new. They limit the number of directorships which may be held by a single individual to twenty. This is based upon the strong recommendation made by the C. I. C. in para 91 of their Report and the draft suggested by the Committee at p. 359. That draft has been split up and amplified so as to make clear provision for all the cases which may arise—*Notes on Clauses*.

**276. Choice to be made by director of more than twenty companies at commencement of Act.—**(1) Any person holding office as director in more than twenty companies immediately before the commencement of this Act shall, within two months from such commencement,—

(a) choose not more than twenty of those companies, as companies in which he wishes to continue to hold the office of director ;

(b) resign his office as director in the other companies ; and

(c) intimate the choice made by him under clause (a) to each of the companies in which he was holding the office of director before such commencement, to the Registrar having jurisdiction in respect of each such company, and also to the Central Government.

(2) Any resignation made in pursuance of clause (b) of

(9) *Re Bodega Co.* (supra).  
 (10) *Hastings & Folkstone Glass Works Ltd. v. Kalson* [1948] 2 A.E.R. 1013 C.A. reversing [1948] 1 A.E.R. 711.

sub-section (1) shall become effective immediately on the despatch thereof to the company concerned.

(3) No such person shall act as director—

(a) in more than twenty companies, after the expiry of two months from the commencement of this Act ; or

(b) of any company after despatching the resignation of his office as director thereof, in pursuance of clause (b) of sub-section (1).

See notes to s. 275.

**277. Choice by person becoming director of more than twenty companies after commencement of Act.—**(1) Where a person already holding the office of director in twenty companies is appointed, after the commencement of this Act, as a director of any other company, the appointment—

(a) shall not take effect unless such person has, within fifteen days thereof, effectively vacated his office as director in any of the companies in which he was already a director ; and

(b) shall become void immediately on the expiry of the fifteen days if he has not, before such expiry, effectively vacated his office as director in any of the other companies aforesaid.

(2) Where a person already holding the office of director in nineteen companies or less is appointed, after the commencement of this Act, as a director of other companies, making the total number of his directorships more than twenty, he shall choose the directorships which he wishes to continue to hold or to accept, so however that the total number of the directorships, old and new, held by him shall not exceed twenty.

None of the new appointments of director shall take effect until such choice is made ; and all the new appointments shall become void if the choice is not made within fifteen days of the day on which the last of them was made.

This was originally cl. 255 of the Bill in which only a period of seven days was allowed for making the choice of directorships. This period has been extended by the Joint Committee to fifteen days (*vide* J. C. R., para 98).

See notes to s. 275.

**278. Exclusion of certain directorships for the purposes of sections 275, 276 and 277.**—(1) In calculating, for the purposes of sections 275, 276 and 277, the number of companies of which a person may be a director, the following companies shall be excluded, namely :—

(a) a private company which is neither a subsidiary nor a holding company of a public company ;

(b) an unlimited company ;

(c) an association not carrying on business for profit or which prohibits the payment of a dividend ;

(d) a company in which such person is only an alternate director, that is to say, a director who is only qualified to act as such during the absence or incapacity of some other director.

(2) In making the calculation aforesaid, any company referred to in clauses (a), (b) and (c) of sub-section (1) shall be excluded for a period of three months from the date on which the company ceases to fall within the purview of those clauses.

This was originally cl. 256 of the Bill. The Joint Committee have made alteration therein with the following observation: "Sub-clause (2) provides for the case where a company ceases to be a private company, or an unlimited company, etc. In such a case, the Committee consider that the imposition of the disqualification with immediate effect will not be right. Sub-clause (2) therefore provides for continuing the exclusion of the companies, notwithstanding the alteration in their character, for a period of three months" (*vide* J. C. R., para 99).

See notes to s. 275.

**279. Penalty.**—Any person who holds office, or acts, as a director of more than twenty companies in contravention of the foregoing provisions shall be punishable with fine which may extend to five thousand rupees in respect of each of those companies after the first twenty.

See notes to s. 275.

### *Retiring age of Directors*

**280. Age limit.**—(1) Save as otherwise provided in section 281, a person shall not be capable of being appointed a director of a public company or of a private company which is a subsidiary of a public company, if he has attained the age of sixty-five years.

(2) Save as aforesaid, a director of a public company or of



a private company which is a subsidiary of a public company shall vacate his office at the conclusion of the annual general meeting commencing next after he attains the age of sixty-five years:

Provided that this sub-section shall not apply to a director who is in office at the commencement of this Act so as to require the termination of the appointment then held by him before the conclusion of the third annual general meeting held after the commencement of this Act, but shall apply so as to terminate the appointment aforesaid at the conclusion of that meeting, if he had attained the age of sixty-five years before the commencement of the meeting.

(3) Where a person retires by virtue of sub-section (2), no provision for the automatic re-appointment of retiring directors in default of another appointment shall apply; and if at the meeting at the conclusion of which he retires, the vacancy is not filled, it may be filled as a casual vacancy under section 262.

SS. 280 to 282 are new. They impose an age limit of directors, but subject to the right of the company to override it. These sections are based on para 90 of the C. L. C. R. and the summary of their recommendations at page 254 of the Report which impose a rigid and inflexible age limit. It is not however considered desirable to go beyond the provisions of the English Act (s. 185) and impose an absolute disqualification on persons who have attained the age of 65. If a company, having been specifically made aware of the age of a director, chooses to appoint him or to declare that he should not retire in virtue of the age limit, it is considered that it is better to permit it to have its own way. The provisions contained in these sections are otherwise closely modelled on the provisions of ss. 185 and 186 of the English Act. As in those sections, it will be open to the company by its articles to impose a lower age limit than 65 if it so chooses—*Notes on Clauses*.

S. 280 corresponds to s. 185 of the English Act of 1948.

**281. Age limit not to apply if company so resolves.—**(1) Nothing in section 280 shall prevent the appointment of a director who has attained the age of sixty-five years or require a director to retire who has attained that age, if his appointment is or was made or approved by a resolution passed by the company in general meeting and specifically declaring that the age limit shall not apply to him.

(2) Special notice shall be required of any such resolution; and unless such notice is given, the resolution shall be void.

(3) Notice of any such resolution given to the company, and by the company to its members, must state or must have stated the age of the person to whom it relates.

See notes to s. 280.

This section corresponds to sub-s. (5) of s. 185 of the English Act of 1948.

**282. Duty of director to disclose age.**—(1) Any person who is appointed, or to his knowledge is proposed to be appointed, director of a company at a time when he has attained the age of sixty-five years or such lower age, if any, as may be specified in the company's articles in this behalf, shall give notice of his age to the company:

Provided that this sub-section shall not apply in relation to a person's re-appointment on the termination of his previous appointment as director of the company, if notice has been given as aforesaid in connection with, or at any time during the continuance of, such previous appointment or any appointment as director prior thereto.

(2) Any person who—

(a) fails to give notice of his age as required by sub-section (1); or

(b) acts as director under any appointment which is invalid, or which has terminated, by reason of his age; shall be punishable with fine which may extend to fifty rupees for every day during which the failure continues or during which he continues to act as aforesaid, as the case may be.

(3) For the purposes of clause (b) of sub-section (2), a person who has acted as director under an appointment which is invalid or has terminated, shall be deemed to have continued so to act throughout the period from the date of the invalid appointment or the date on which the appointment terminated, as the case may be, until the last day on which he acted thereunder.

See notes to s. 280.

This section corresponds to s. 186 of the English Act of 1948.

### *Vacation of Office by Directors*

**283. Vacation of office by directors.**—(1) The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section 270, or at any time thereafter ceases to hold, the share qualification, if any, required of him by the articles of the company;

(b) he is found to be of unsound mind by a Court of competent jurisdiction;

(c) he applies to be adjudicated an insolvent;

(d) he is adjudged an insolvent;

(e) he is convicted by a Court in India of any offence and is sentenced in respect thereof to imprisonment for not less than six months;

(f) he fails to pay any call in respect of shares of the company held by him, whether alone or jointly with others, within six months from the last date fixed for the payment of the call;

(g) he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board;

(h) he, or any firm in which he is a partner or any private company of which he is a director, accepts a loan, or any guarantee or security for a loan, from the company in contravention of section 295;

(i) he acts in contravention of section 299;

(j) he becomes disqualified by an order of Court under section 203; or

(k) he is removed in pursuance of section 284.

(2) Notwithstanding anything in clauses (d), (e) and (j) of sub-section (1), the disqualification referred to in those clauses shall not take effect—

(a) for thirty days from the date of the adjudication, sentence or order;

(b) where any appeal or petition is preferred within the thirty days aforesaid against the adjudication, sentence or conviction resulting in the sentence, or order until the expiry of seven days from the date on which such appeal or petition is disposed of; or

(c) where within the seven days aforesaid, any further appeal or petition is preferred in respect of the adjudication, sentence, conviction, or order, and the appeal or petition, if allowed, would result in the removal of the disqualification, until such further appeal or petition is disposed of.

(3) A private company which is not a subsidiary of a public company may, by its articles, provide, that the office of director shall be vacated on any grounds in addition to those specified in sub-section (1).

This section is based on s. 86 I and reg. 77 of Table A of the previous Act and paras 92 and 93 of the C. L. C. R. and the summary at page 265. Power has been given to the company to remove the director by an ordinary resolution as in s. 184 (1) of the English Act. Sub-s. (2) is a consequential provision, which is clearly necessary. Sub-s. (3) corresponds to sub-s. (2) of s. 86 I of the previous Act but confines the operation of the sub-section to private companies which are not subsidiaries of public companies.—*Notes on Clauses.*

This was originally cl. 261 of the Bill in which alteration has been made by the Joint Committee with the following observation : "A new sub-clause has been added to make provision for cases where there is an appeal against the adjudication or sentence. In such cases the disqualification will not come into force for a reasonable period after the date of adjudication or sentence, so as to enable the disqualifying person to prefer an appeal. If an appeal is actually filed, the disqualification will not operate until the appellate Court pronounces judgment. These are based on similar provisions in the Chapter on managing agents—*vide* clause 300 (now s. 331)" (see J. C.R., para 100).

**1024A.** In cl. (f) of sub-s. (1) of this section after the word "he" the words "or any firm in which he is a partner", and after "held by him" the words "or the firm" have been omitted by the Lok Sabha.

Under the corresponding section 86 I of the previous Act a director vacated office if the contingency mentioned in that section arose. That was a statutory provision and the articles of association could not detract from it. But sub-s. (2) of s. 86 I provided that nothing contained in that section should be deemed to preclude a company from providing additional grounds (11). In the last cited case on the construction of the articles of a private company it was held that it could not be said that it went without saying that a director appointed by the group mentioned in article 88 vacated office as soon as the appointing authority ceased to hold the shares referred to in the article.

See notes to s. 274 for other cases.

**284. Removal of directors.**—(1) A company may, by ordinary resolution, remove a director (not being a director appointed by the Central Government in pursuance of section 408) before the expiry of his period of office:

Provided that this sub-section shall not, in the case of a private company, authorise the removal of a director holding office for life on the 1st day of April, 1952, whether or not he is subject to retirement under an age limit by virtue of the articles or otherwise:

Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 265 to appoint not less than two-thirds of the total number of directors according to the principle of proportional representation.

(2) Special notice shall be required of any resolution to remove a director under this section, or to appoint somebody

instead of a director so removed at the meeting at which he is removed.

(3) On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

(4) Where notice is given of a resolution to remove a director under this section and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it do so,—

(a) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company);

and if a copy of the representations is not sent as aforesaid because they were received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting:

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Court may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

(5) A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board in pursuance of section 262, be filled by the appointment of another director in his stead by the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-section (2).

A director so appointed shall hold office until the date up

to which his predecessor would have held office if he had not been removed as aforesaid.

(6) If the vacancy is not filled under sub-section (5), it may be filled as a casual vacancy in accordance with the provisions, so far as they may be applicable, of section 262, and all the provisions of that section shall apply accordingly:

Provided that the director who was removed from office shall not be re-appointed as a director by the Board of directors.

(7) Nothing in this section shall be taken—

(a) as depriving a person removed thereunder of any compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director; or

(b) as derogating from any power to remove a director which may exist apart from this section.

This section corresponds to s. 86 G of the previous Act. It is based on s. 184 of the English Act of 1948 and para 111 of the C. L. C. R. As in the English section a director whose removal is proposed will have an opportunity for making representations to the company and also to be heard orally at the general meeting before which the subject comes up for consideration—*Notes on Clauses*.

Some alterations have been made in this section by the Joint Committee.

In sub-s. (1) of this section the words and brackets "(not being a director appointed by the Central Government in pursuance of section 408)" and the second proviso thereto have been added by the Lok Sabha.

**1025. Removal of directors** :—A company, whose directors were appointed under its articles for a definite period, there was no inherent power to remove them before the expiration of the period without first altering the articles; even a special resolution for removal would not be effective (12).

Where the articles provide that a company may remove any director "for negligence, misconduct or any other reasonable cause", it is the general meeting which can judge whether the cause is reasonable or not, and in the absence of fraud the Court will not interfere with the decision of the general meeting (13).

**Exclusion** :—A director who has been excluded from Board meetings by his co-directors has the right to compel them to admit him (14).

### *Meetings of Board*

**285. Board to meet once in every three months**.—In the case of every company, a meeting of its Board of directors shall be held at least once in every three calendar months.

- (12) *Imperial Hydropathic Hotel Co. v. Hampson* [1883] 23 Ch. D. 1. *Howden v. Yorkshire Miners' Assn.* [1903] 1 K.B. 308, 338; *Boschock & Co. v. Fuke* [1906] 1 Ch. 148; *Thomas Logan Ltd. v. Davies* [1911] 104 L.T. 914, on appeal 105 L.T. 409.  
(13) *Inderwick v. Snell* [1849] 2 M.ac. & G. 216; *Hayman v. Rugby School* [1874] 18 Eq. 28.  
(14) *Pulbrook v. Richmond Mining Co.* [1878] 9 Ch. D. 610.

This section is new. It is based on the recommendation made by the C. L. C. R. in para 109—*Notes on Clauses*.

Some alterations have been made in this section by the Joint Committee, inserting 3 months in place of 2 months.

**286. Notice of meetings.**—(1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

(2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to one hundred rupees.

This section also is new. It is based on recommendation (iv) in para 109 of the C. L. C. R.—*Notes on Clauses*.

Some alterations have been made in this section by the Joint Committee.

**287. Quorum for meetings.**—

(1) In this section—

(a) “total strength” means the total strength of the Board of directors of a company as determined in pursuance of this Act, after deducting therefrom the number of the directors, if any, whose places may be vacant at the time; and

(b) “interested director” means any director whose presence cannot, by reason of section 300, count for the purpose of forming a quorum at a meeting of the Board, at the time of the discussion or vote on any matter.

(2) The quorum for a meeting of the Board of directors of a company shall be one-third of its total strength (any fraction contained in that one-third being rounded off as one), or two directors, whichever is higher:

Provided that where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength, the number of the remaining directors, that is to say, the number of the directors who are not interested, shall be the quorum during such time.

This section corresponds to reg. 88 of Table A of the previous Act. It was based on recommendation (iv) in para 109 of the C. L. C. R. In cl. (a) of this section the intention has been made clear, *viz.*, that members whose places may be vacant should also be taken into account for the purpose of calculating the quorum—*Notes on Clauses*.

See reg. 99 of Table A of the English Act of 1948.

The original section has however been replaced by the present section by the Lok Sabha.

**1026. Where articles did not fix quorum:**—Where the articles did not prescribe a quorum the number who usually acted on conducting business would constitute a quorum (15), or a majority of the directors might form a quorum (16). Unless a quorum is present the business transacted is void (17).

**1027. What is quorum:**—The quorum must not be a quorum of persons not competent to vote (17), *e.g.*, directors who are interested in the contract under discussion (17); and the objection will not be removed by dividing the business into two resolutions and each director voting on the resolution affecting the other, or reducing the quorum to one to make the other alone to form a quorum (18).

**1028. Quorum—meaning:**—A "quorum" in fact means a given number of individuals out of the whole body all of whom have had notice of the meeting and who have attended the meeting (19).

**1029. Notice:**—In the absence of any rule to the contrary where a committee or other body is empowered to act by a certain number of its members as a quorum, it is well established that there is no quorum and the proceedings of the meeting are invalid, unless notice of the meeting is given to all the members of that committee or other body (19).

**1030. Presumption:**—Where the articles provide that the quorum may be fixed by the directors, an outsider is entitled to assume that the directors have acted with a proper quorum (20).

**1031. Committee:**—Under the previous law the directors might appoint a quorum of one or delegate powers to a committee consisting of one director only (21).

**1032. Exclusion:**—The presence of a quorum does not prevent a lawfully constituted director from attending the Board meeting or does not allow a portion of the Board to exclude others (22).

**1033. If the number in office is less than a quorum:**—Where the number remaining in office was less than a quorum it was doubted whether they could act (23).

## **288. Procedure where meeting adjourned for want of quorum.—**

(1) If a meeting of the Board could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned till the same day in the next week, at the same time and place, or if that day is a public holiday, till the next succeeding day which is not a public holiday, at the same time and place.

(2) The provisions of section 285 shall not be deemed to have been contravened merely by reason of the fact that a

(15) *Regent's Canal Ironworks* [1867] W.N. 79; *Lyster's case* [1867] 4 Eq. 233.

(16) *York Tramways Co. v. Willows* [1882] 8 Q.B.D. 685; *Ganesh Flour Mills Co. v. Jagmohan* [1942] L. 68, 44 P.L.R. 15, 199 I.C. 387.

(17) *Yull v. Greymouth Point Co.* [1904] 1 Ch. 32.

(18) *North Eastern Insurance Co.* [1919] 1 Ch. 198, 207.

(19) *Bell v. Royal Western Indian Turf Club, Ltd.* [1945] 47 Bom. L.R. 916, [1946] B. 88; *Balakrishna v. Balu Subudhi* [1949] Pat. 184.

(20) *County of Gloucester Bank v. Rudry Merthyr & Co.* [1895] 1 Ch. 629; *Bank of Syria* [1901] 1 Ch. 115; *Cox v. Dublin City Distillery* [1915] 1 I.R. 345.

(21) *Fireproof Doors Ltd.* [1916] 2 Ch. 142; see reg. 91 of the old Act.

(22) *Per Chitty J. in Harben v. Phillips* [1883] 23 Ch. D. 14 at p. 26.

(23) *See Bank of Syria* [1900] 2 Ch. 272; *Newhaven Local Board v. Newhaven School Board* [1885] 30 Ch. D. 351.



meeting of the Board which had been called in compliance with the terms of that section could not be held for want of a quorum.

This section is new and has been substituted by the Lok Sabha for the original section which was based on the latter part of the recommendation in para 109 of the C.L.C.R.—*Notes on Clauses*.

The original cl. 267 of the Bill has been omitted by the Joint Committee as they considered it unnecessary (*vide* J.C.R., para 101).

**289. Passing of resolutions by circulation.**—No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or to all the members of the committee, then in India (not being less in number than the quorum fixed for a meeting of the Board or committee, as the case may be), and to all other directors or members at their usual address in India, and has been approved by such of the directors as are then in India, or by a majority of such of them, as are entitled to vote on the resolution.

This section also is new. It is based on recommendations (iii) of para 109 of the C.L.C.R. The Joint Committee have made some alteration in this section.

The last two lines of this section have been altered by the Lok Sabha.

**1033A. Resolution by circulation** :—This new section makes an exception to the rule that the directors cannot think without a meeting and that the company is entitled to the "combined wisdom" of the directors in meeting (24).

**290. Validity of acts of directors.**—Acts done by a person as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles:

Provided that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been shown to the company to be invalid or to have terminated.

This section corresponds to s. 86 of the previous Act and s. 180 of the English Act of 1948. The case where the appointment of a director is terminated has also been included within the scope of the section—*Notes on Clauses*.

**1034. Section based on English decisions** :—The section seems to be based upon the principles of the decisions noted below (25), where it was held that if the

(24) *Transport Co. v. Tiruneveli M. B. Service Co.* [1955] N.U.C. 3186 (Mad.).

(25) *Dawson v. African Consolidated Co.* [1898] 1 Ch. 6; *British Asbestos Co. v. Boyd* [1903] 2 Ch. 499; *Southern Counties Bank v. Rider* [1895] 73 L.T. 374; *Briton Medical Assn. v. Jones* [1889] 61 L.T. 384; *Bridport Old Brewery Co.* [1867] 2 Ch. D. 14; *Harben v. Phillips* [1883] 23 Ch. D. 14.

articles so provide, the acts of the directors should be valid notwithstanding any irregularity subsequently discovered regarding their appointment (26). The resolutions of a general meeting convened by *de facto* directors are not invalidated by an irregularity in the constitution of the Board (27).

**1035. Validity of acts of the directors :**—As between a company and third persons the directors *de facto* are directors *de jure* (28). Where directors were appointed at a meeting which was convened after a notice one day too short, the defect was cured by s. 67 of the English Act of 1862 (corresponding to the present section) (29). There is nothing in the section to limit its operation to the validation of acts and contracts affecting persons outside and not members of the company. Accordingly the call by the directors was properly made (30). Acts *bona fide* done by a director are valid and that is so not only between the company and outsiders, but also between the company and its members (31). Where a person in good faith thinking himself to be a director so acts and signs a plaint on behalf of the company, he is regarded as a *de facto* director and his act is validated by this section (32). Where in the course of proceedings in Court a mere doubt is raised as to the validity of the position of such a director, such raising of doubt is not enough to "show" that his appointment was invalid. The appointment cannot be considered to be "shown" to be invalid until the Court has come to a definite decision on the point (32).

The directors of a company knew that they had not paid the allotment and call moneys, but there was nothing to indicate that the fact that they had thereby disqualified themselves was present to their minds when they allotted the shares and made the calls. There was no defect in their appointment as directors. There was no suggestion that they acted dishonestly in passing the resolutions of allotment and calls. *Held*, that the acts of allotting shares and making the calls were valid (33).

A person claiming protection under this section is entitled to it only if he is ignorant of the irregularity, although those acting for the company are aware of it. But where such person is put upon inquiry as to the disputed right of the alleged director to act as such and failed to make proper inquiries, he is not entitled to the protection of this section (34). Thus a director, who has been such from the formation of the company and has taken an active part in the management, will not be allowed to set up that the directors were illegally appointed, so that everything done by them was *ab initio* void or that notices of his own acts were not served upon him (35). A defect in the formation of the Board cannot adversely affect the right of a person who has no knowledge of the infirmity (36).

Where a company is shown to have accepted a certain person for many years as its director and has never on any occasion repudiated any of his acts as such, it is not open to a shareholder or any other person to challenge the appointment of such a director (37).

(26) *Channel Collieries Trust v. Dover &c. Railway Co.* [1914] 2 Ch. 506; *Boschoeck Proprietary Co. v. Fuke* [1906] 1 Ch. 148.

(27) *Boschoeck Proprietary Co. v. Fuke*, *supra*.

(28) *Hope Mills v. Sir Kowaji* [1910] 13 Bom. L.R. 162, 10 I.C. 748.

(29) *Barton Medical &c. Assn. v. Jones* [1889] 61 L.T. 384.

(30) *Barton Medical &c. Assn. v. Jones*, *supra*.

(31) *Ram Narain v. Ramkishan* [1911] 10 I.C. 515.

(32) *Ram Raghuhir v. United Refineries Ltd.* [1931] R. 139, 9 Rang. 56, 134 I.C. 737. This decision was passed after remand of the appeal [1930] R. 54 for finding facts necessary under s. 86 of the previous Act.

(33) *Shiromani Sugar Mills v. Devi Prasad* [1950] A. 508.

(34) *Kanseon v. Rialto (West End), Ltd.* [1944] 1 All E.R. 751 (C.A.) reversing the judgment of Cohen J. in [1944] 1 Ch. 154, 170 L.T. 161.

(35) *Jones v. North Vancouver &c. Co.* [1910] A.C. 317.

(36) *Shival v. Tricomdas Mills Co.* [1911] 14 Bom. L.R. 45.

(37) *Imperial O. S. & G. Mills v. Wazir Singh* [1915] 31 I.C. 595, 182 P.W.R. 1915.

**1036. Proviso :—**The provisions of this section do not operate to render good the authority of former directors who without being re-elected continue after expiration of their terms of office to discharge the duties of directors well knowing that they have not been re-elected (37). The receipt of payment made by these as directors by one aware of their true position does not estop that person from subsequently questioning their legal authority to demand as directors payments from him (38). When a defect has been discovered, subsequent acts are not valid (39). The section may however validate acts of the director not only as between the company and the outsiders, but as between the company and the members or between the members *inter se* (40). While it validates the director's act, it does not entitle him to the remuneration attached to the office (41).

It has been held by the Lahore High Court that a director invalidly appointed cannot, in the absence of a provision in the articles, bind the shareholders unless the defect is unknown at the time (42).

For further cases see reg. 80 of Table A *post* and notes thereunder.

### *Board's powers and restrictions thereon*

**291. General powers of Board.** —(1) Subject to the provisions of this Act, the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:

Provided that the Board shall not exercise any power or do any act or thing which is directed or required, whether by this or any other Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting:

Provided further that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.

(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

This section corresponds to reg. 71 of Table A of the previous Act. It is based on para 101 and the draft of s. 86CC at p. 361 of the C.L.C.R. It lays down the principle that, subject to the specific exceptions mentioned, the directors of the company as its governing body are entitled to exercise all the powers of the company—*Notes on Clauses*. Some verbal changes have been made herein by the Joint Committee.

See reg. 80 of Table A of the English Act of 1948.

(38) *Tyne Mutual S. S. Insurance Co. v. Brown* [1896] 74 L.T. 283.

(39) *Bridport Old Brewery Co.* [1867] 2 Ch. App. 191; *Harben v. Phillips* (supra).

(40) *Dawson v. African Consolidated Co.* (supra); *British Asbestos Co. v. Boyd* (supra); *Channel Collieries Trust v. Dover Ry. Co.* (supra).

(41) *Ex p. Birkenshaw* [1904] 2 K.B. 327.

(42) *Devi Dutta v. Standard Bank* [1927] L. 797, 101 I.C. 568.

**1037. Managing :—**Managing the business of the company includes institution of suits on its behalf when it becomes necessary in the course of management (43).

**1038. Director's duty :—**A director's duty requires him to act with such care as is reasonably to be expected from him having regard to his knowledge and experience. He is not bound to bring any special qualification to his office, but if he is acquainted with the particular business carried on by the company he must give the company the advantage of his knowledge. He is not responsible for damage occasioned by errors of judgment (44).

**1039. Company bound by his acts :—**A company is bound by the acts of directors, however irregular they may be, provided they are authorized by the company's constitution (45). Where at a meeting of the directors of a company one of the body was authorized by a power of attorney to be executed by two of the directors to appoint or dismiss servants of the company and pursuant to the power of attorney the general manager was dismissed by the director so authorized, it was held that the order of the dismissal was valid though some of the directors continued to recognize him as such (46).

**1040. They are trustees but not for individual members :—**The directors are trustees of the powers committed to them, as for instance, the power of approving transfer of shares, of allotting shares, of employing the funds of the company, of making calls or receiving payment in advance of calls, or forfeiting shares, and as trustees they may be rendered liable for their misuse (47). They are not however trustees for individual members (48).

**1041. Directors' powers :—**This section delegates to the directors power to do every thing that the company can do except where the authority of a general meeting of the company is expressly prescribed, and such delegation would include power to issue preference shares (49), and to borrow money for the purpose of the company by mortgaging the company's property (50). The directors can do all acts necessary for management of the company (51), including giving gratuity to its servants (52). But when the undertaking of the company is sold, neither the directors nor the majority of the shareholders can give such gratuity against the wishes of the minority (53).

It is within the powers of the directors to compromise a suit in the interest of the company even if the suit is ill-founded (54). An action by the company should be commenced only by the directors (55).

The powers vested in a Board of directors cannot be interfered with by the shareholders as such. If the shareholders are dissatisfied with what the directors do,

(43) *Ebrahim v. South India Industrials* [1938] M. 962, [1938] 2 M.L.J. 568.

(44) *Brazilian Rubber Estates* [1911] 1 Ch. 425.

(45) *Spackman v. Evans* [1868] 3 H.L. 171.

(46) *Gurprasad v. Rameshwar* [1933] A. 344, [1933] A.L.J. 290, 143 I.C. 7.

(47) *Buckley*, 11th ed. p. 728 and cases collected there. For cases where the directors were held liable for misapplication of the company's funds see *ibid* pp. 728 & 732 to 734.

(48) *Percival v. Wright* [1902] 2 Ch. 421; *Wilson v. Alacunliffe* [1896] 18 All 56; *Bath v. Standard Land Co.* [1911] 1 Ch. 618; cf. *Allen v. Hyatt* [1914] 30 T.L.R. 444.

(49) *Campbell v. Rofe* [1933] A.C. 91 (P.C.) at p. 99.

(50) *Australian Auxiliary S. C. Co. v. Mounsey* [1858] 4 K. & J. 733.

(51) *West of England Bank* [1881] 14 Ch. D. 317.

(52) *Hampson v. Price's P. Candle Co.* [1876] 34 L.T. 711; *Henderson v. Bank of Australasia* [1889] 40 Ch. D. 170.

(53) *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D. 651; see also *Stroud v. Royal Aquarium* [1903] W.N. 146; *Kave v. Croydon Tramways Co.* [1898] 1 Ch. 358 (367), 89 L.T. 243.

(54) *Yates v. Cyslists' Touring Club* [1908] 24 T.L.R. 581.

(55) *La Compagnie de Mayville v. Whiteley* [1896] 1 Ch. 803.

their remedy is to remove them in the manner provided by the articles. But so long as a Board of directors exists and particular powers are vested in it by the articles, the directors are entitled to exercise those powers without interference by the shareholders (56).

**1042. Company in general meeting cannot take the conduct of business out of their hands :—**Unless the Act or the articles otherwise require the directors to conform to directions given by the company in general meeting, the latter cannot, except by special resolution, take the conduct of the business out of the directors or to compel them to adopt a particular line of action, such as sealing a draft deed or effecting a sale of company's property (57). "I find the greatest difficulty in seeing," said Lord Clauson, J. "how any resolution of the company in general meeting controlling the directors in the management of the business, can possibly be justified under the articles" (58). But the expression "business of the company" in Reg. 71 of Table A of the previous Act did not include the fixing of the directors' own remuneration (59). Directors cannot by contract deprive themselves of the power to control a manager so as to confer power on him to the exclusion of themselves (60).

In a very recent case Lord Justice Cohen has observed as follows : "There is nothing unusual in the shareholders not being allowed to interfere in matters which have been deliberately placed under the control of the directors. In that connection I have in mind some observation of the House of Lords in the case of *Quin & Axtens v. Salmon* (61) which are cited in the eleventh edition of Buckley on the Companies Act at page 723, where the citation is in these terms : 'Even a resolution of a numerical majority of general meeting of the company cannot impose its will upon the directors when the articles have confided to them of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted, they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions, even of all corporators acting as individuals' " (62).

**1043. Authority is circumscribed by memo. and articles :—**Where the authority of the directors is defined by the memorandum or the articles of association, they have no power to go beyond this or to undertake any transaction outside the scope of the company's business. But not only do their acts bind the company when done within the scope of their authority, but also where, however irregular, they belong to a class of acts which is authorized by the constitution of the company. A company is bound by its dealings with strangers who act *bona fide* with the company. A company is liable for all acts done by its directors even though unauthorized, provided that such acts are within the apparent authority of the directors and not *ultra vires* (63). See notes to s. 252, *ante*.

**1044. Ratification of directors' acts :—**If the act of directors is not *ultra vires* it can be ratified by the company; but such ratification of acts done by the directors in excess of their authority given to them by the articles does not extend

(56) *Jagadish v. Paras Ram* [1941] A. 360 (363), [1941] A.L.J. 483.

(57) *Automatic Self-Cleansing Filter Co. v. Cunningham* [1906] 2 Ch. 34; *Gramophone & Typewriter v. Stanley* [1908] 2 K.B. 89; *Salmon v. Quin & Axtens* [1909] A.C. 442.

(58) *Scott v. Scott* [1943] 1 A.E.R. 582 at p. 585.

(59) *Foster v. Foster* [1916] 1 Ch. 532.

(60) *Horn v. Henry Faulder & Co.* [1908] 99 L.T. 524.

(61) [1909] A.C. 442.

(62) *Grundt v. Great B. P. G. Mines Ltd.* [1948] L.J.R. 1100 at p. 1109 (C.A.).

(63) *Ram Baran v. Muffassil Bank* [1925] A. 206, 83 I.C. 142.

to give validity to acts of similar character done subsequently (64). Power given by the articles to directors to raise a loan justifies a mortgage (65).

**1045. Indemnity clause in articles :—**Where the articles provided that "no director shall be liable for any loss, damage or misfortune whatever which shall happen in execution of the duties of his office or in relation thereto unless the same happens through his dishonesty", it was held that the provision was not illegal and that the articles were intended to relieve the directors, who acted honestly, from liability for damages occasioned even by their negligence when such negligence was not dishonest (66). See ss. 201 and 633.

**1046. Outsider acting in good faith :—**A bank acting in good faith and without notice of any irregularity is not bound before honouring the cheque to inquire into the state of the accounts between the company and its managing director (67).

**1047. Liability to pay preliminary expenses :—**It has been held in England that under similar articles the company cannot be sued if the directors do not pay the preliminary expenses, even though it has taken benefit of the work done under a contract made before its formation (68). For a discussion of the Indian law in this respect see notes to sec. 34 under the heading "Contract before incorporation."

For other cases see notes to ss. 34, 62 and 252.

**1048. Powers or acts directed or required by this Act to be exercised or done by company in general meeting :—**In addition to those to be exercised or done by Special Resolution (see Note 870 *ante*) the following are the powers or acts directed or required by the present Act to be exercised or done by the company in general meeting :

To rectify name of company—s. 22 (1).

To give authority for varying the terms of a contract referred to in the prospectus or statement in lieu of prospectus—s. 61.

To authorise the issue at a discount of the shares of a class already issued by the company—s. 79 (2).

To give directions as to the offer of shares issued in pursuance of s. 81—s. 81 (1).

To alter the share capital of the company under s. 94—s. 94 (2).

To lay down conditions subject to which the new shares have been or are to issued—s. 97 (2).

To do by an unlimited company having a share capital by its resolution for registration as a limited company the acts mentioned in cls. (a) and (b) s. 98—s. 98.

To alter the rights of special classes of shares—s. 106.

To cancel redeemed debentures—s. 121 (1) (b).

To appoint directors—s. 255.

To increase or reduce the number of directors within the limits fixed by the articles—s. 258.

To declare that the age limit mentioned in s. 280 shall not apply to a particular director—s. 281.

To remove a director before the expiry of his period of office—s. 284 (1).

To fill up the vacancy vacated by the removal of a director under s. 284 by the appointment of another director in his place—s. 284 (5).

(64) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366.

(65) *Karnot v. Walter* [1882] 9 Cal. 14.

(66) *Brazilian Rubber Estates* [1911] 1 Ch. 425. But see s. 201.

(67) *Bank of New South Wales v. Goulburn Valley &c. Ltd.* [1902] A.C. 543.

(68) *English & Colonial Produce Co.* [1906] 2 Ch. 435, 442; *Clinton's Claim* [1908] 2 Ch. 515; *Empress Engineering Co.* [1880] 16 Ch. D. 125; *Rotherham Alum Co.* [1889] 25 Ct. D. 109. But see *Hereford Wagon Co.* [1876] 2 Ch. 621.

To impose restrictions and conditions on the exercise by the Board of any of the powers specified in sub-s. (1) of s. 292—s. 292 (5).

To permit the Board of director to perform any of the acts specified in sub-s. (1) of s. 293—s. 293.

To approve of the appointment of sole selling agents—s. 294.

To exercise the power mentioned in the last sentence of s. 298—s. 298.

To determine the remuneration of the directors as provided in s. 309 (1).

To authorise the appointment of alternate directors and settle their terms of office as provided in s. 313.

To approve the proposal of receiving from the transferee or any other person by a director any payment by way of compensation for loss of office or as consideration for retirement from office as provided in s. 319.

To appoint or re-appoint a managing agent in respect of a company to which the prohibition specified in s. 324 or s. 325 does not apply—s. 326 (1) (a).

To vary the terms of a managing agency agreement—s. 329.

To remove the managing agent for fraud or breach of trust as provided in s. 337.

To accept resignation of office by managing agent as provided in s. 342—s. 342 (5).

To approve transfer of office by the managing agent—s. 343.

To specify suitable instalments in which the minimum remuneration to the managing agent is payable—s. 353, Proviso.

To sanction re-imbursement of the managing agent's expenses as provided in s. 354 or sub-s. (1) of s. 358.

To authorise the managing agent or his associate to retain any commission etc. earned or to be earned by him as the managing agent etc. of other concerns—s. 359 (1).

To sanction investments by an investing company in the shares or debentures of any other body corporate in the same group in excess of the limits specified in sub-s. (2) and its proviso, of s. 372—s. 372 (3).

To authorise investment as mentioned in s. 373.

To require the company to be wound up under cl. (a) of sub-s. (1) of s. 484.

To appoint and fix remuneration of the liquidators in a members' voluntary winding up—s. 490 (1).

To sanction continuance of the Board's power on the appointment of a liquidator in a members' voluntary winding up—s. 491.

To fill vacancy in office of liquidator in a members' voluntary winding up—s. 492.

To consider the accounts etc. laid before it by the liquidator in a members' voluntary winding up—s. 496 and 497.

To nominate a liquidator in a creditors' voluntary winding up—s. 502.

To appoint certain number of members of the committee of inspection in a creditors' voluntary winding up—s. 503.

To consider accounts etc. laid before it by the liquidator in a creditors' voluntary winding up—s. 508 and s. 509.

## **292. Certain powers to be exercised by Board only at meeting.—**

(1) The Board of directors of a company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the Board:—

(a) the power to make calls on shareholders in respect of money unpaid on their shares;

(b) the power to issue debentures;

(c) the power to borrow moneys otherwise than on debentures;

- (d) the power to invest the funds of the company; and
- (e) the power to make loans:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the managing agent, secretaries and treasurers, or the manager of the company, or in the case of a banking company, also to a manager or other principal officer of a branch office of the company, the powers specified in clauses (c), (d) and (e), to the extent specified in sub-sections (2), (3) and (4) respectively.

(2) Every resolution delegating the power referred to in clause (c) of sub-section (1) shall specify the total amount up to which moneys may be borrowed by the delegate.

(3) Every resolution delegating the power referred to in clause (d) of sub-section (1) shall specify the total amount up to which the funds may be invested, and the nature of the investments which may be made, by the delegate.

(4) Every resolution delegating the power referred to in clause (e) of sub-section (1) shall specify the total amount up to which loans may be made by the delegate, the purposes for which the loans may be made, and the maximum amount of loans which may be made for each such purpose in individual cases.

(5) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in sub-section (1).

This section is new. It is based on sub-s. (2) of the draft of s. 86 CC at page 361 of the C. L. C. R. and the note to that sub-section—*Notes on Clauses*.

This was originally cl. 271 of the Bill. The proviso to sub-s. (1) thereof has been modified by the Joint Committee by including the manager or other principal officers of a branch office of a banking company within the scope of the delegation provided for in the proviso (*vide* J. C. R., para 102).

**293. Restrictions on powers of Board.**—(1) The Board of directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the consent of such public company or subsidiary in general meeting,—

- (a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole; of any such undertaking;



(b) remit, or give time for the re-payment of, any debt due by a director;

(c) invest, otherwise than in trust securities, the sale proceeds resulting from the acquisition, after the commencement of this Act, without the consent of the company, of any such undertaking as is referred to in clause (a), or of any premises or properties used for any such undertaking and without which it cannot be carried on or can be carried on only with difficulty or only after a considerable time;

(d) borrow moneys after the commencement of this Act, where the moneys to be borrowed, together with the moneys already borrowed by the company, (apart from temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of the paid-up capital of the company and its free reserves, that is to say, reserves not set apart for any specific purpose; or

(e) contribute, after the commencement of this Act, to charitable and other funds not directly relating to the business of the company or the welfare of its employees, any amounts the aggregate of which will, in any financial year, exceed twenty-five thousand rupees, or five per cent. of its average net profits as determined in accordance with the provisions of sections 349 and 350 during the three financial years immediately preceding, whichever is greater.

*Explanation.*—Where a portion of a financial year of the company falls before the commencement of this Act, and a portion falls after such commencement, the latter portion shall be deemed to be a financial year within the meaning, and for the purposes, of clause (e).

(2) Nothing contained in clause (a) of sub-section (1) shall affect—

(a) the title of a buyer or other person who buys or takes a lease of any such undertaking as is referred to in that clause, in good faith and after exercising due care and caution; or

(b) the selling or leasing of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

(3) Any resolution passed by the company permitting any transaction such as is referred to in clause (a) of sub-section (1) may attach such conditions to the permission as may be specified

in the resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transaction:

Provided that this sub-section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in that behalf in this Act.

(4) The acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of moneys by the banking company within the meaning of clause (d) of sub-section (1).

(5) No debt incurred by the company in excess of the limit imposed by clause (d) of sub-section (1) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded.

This section corresponds to s. 86H of the previous Act and is based on para 102 of the C. L. C. R. The additional restrictions suggested in that para have been added. The section gives a reasonable measure of protection to lenders who have acted in ignorance of the fact that the restrictions imposed on the company by the section have not been observed. See reg. 70 of the English Act of 1948—*Notes on Clauses*.

See Reg. 73 of Table A of the previous Act.

This was originally cl. 272 of the Bill, in which alterations have been made by the Joint Committee with the following observation: "*Sub-clause (1) (d).*—Temporary loans obtained from the company's bankers in the ordinary course of business have been excluded when reckoning the limit upto which a company may borrow.

"*Sub-clause (1) (e).*—It has been made clear that the contributions referred to in this sub-clause relate to charitable and other funds which do not directly relate to the business of the company or the welfare of its employees. The limit of the contribution has been raised to ten thousand rupees or three per cent. of the annual net profits.

"Sub-clause (4) provides that the acceptance of deposits from the public by a banking company is not a borrowing of moneys within the meaning of this clause.

"*Sub-clause (5).*—The Committee have provided that where any borrowing by a company is in excess of the limit imposed by sub-clause (1) (d), the debt will not be binding on the company, unless the lender who advances the loan has done so in good faith and without knowledge of the limit having been exceeded" (*vide* J. C. R., para 103).

The Lok Sabha has raised the contribution to twenty-five thousand rupees or five per cent. of the annual net profits and has made other alterations in cl. (e) and has added the Explanation to sub-s. (1) of this section.

See in this connection the Companies (Donations to National Funds) Act 1951, printed as Appendix H.

**1048A. Sub-s. (1), cl. (a). "Sell, lease" etc. of Undertaking** :—This clause puts a restriction on the powers of the directors in regard to disposing of the under-

taking of a company, but it does not say, that such a thing cannot be done. All it says is that it must be done with the consent of the company, i.e., the shareholders (69). If an act is not *ultra vires* of the company and it is capable of being ratified or approved of by the company, it is not open to a minority of shareholders to object to the act unless it is a fraud on them or the majority have abused their powers and are depriving the minority of their rights (69).

**1048B. Sub.s (1), cl. (d) :—**This clause limits the directors' authority to borrow. It requires that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the section is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans (70). Where however the loans, although in excess of the authority of the directors are not *ultra vires*, the money having been received and applied for its purposes, the official liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced (70).

Where power is given by the articles to raise money on the security of the company's uncalled share capital, it can be effectually charged (71).

**1049. Ratification :—**The limitation imposed by the form of regulation 79 of Table A of the old Act was merely one of authority of the directors and not a limitation of the general powers of the company. The acts of the directors in excess of their authority could be ratified by the company (72).

**294. Appointment of sole selling agents to require approval of company in general meeting. —(1)** After the commencement of this Act, the Board of directors of a company shall not appoint a sole selling agent for any area, except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in general meeting within a period of six months from the date on which the appointment is made.

(2) If the company in general meeting disapproves of the appointment, or does not approve of it within the period of six months aforesaid, it shall cease to be valid with effect from the date of such disapproval, or the expiry of the period of six months aforesaid, whichever is earlier.

(3) Where before the commencement of this Act, a company has appointed a sole selling agent for any area for a period of not less than five years, the appointment shall be placed before the company in general meeting within a period of six months

(69) *Kirpa Ram v. Shriyans Prasad* [1951] Punj. 79, 53 P.L.R. 469.

(70) *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd.* [1938] P.C. 159, [1938] Bom. 421, 42 C.W.N. 733. See in this connection *Norwich Yarn Co.* [1856] 22 Beav. 143 and *Ex. p. Bradshaw* [1879] 15 Ch. D. 465.

(71) *Newton v. Debenture-holders &c. Assn.* [1895] A.C. 244 (P.C.).

(72) *Irvine v. Union Bank of Australia* [1877] 2 App. Cas. 366 (P.C.).

from such commencement; and the company in general meeting may, by resolution,—

(a) if the appointment was made on or after the 15th day of February, 1955, terminate the appointment forthwith or with effect from such later date as may be specified in the resolution; and

(b) if the appointment was made before the date specified in clause (a), terminate the appointment with effect from such date as may be specified in the resolution, not being earlier than five years from the date on which the appointment was made, or the expiry of one year from the commencement of this Act, whichever is later.

This section is new. It has been inserted by the Joint Committee with the following observation : "This new clause provides that appointments of sole selling agents made by the Board of directors of a company should be specifically approved by the company in general meeting. If such approval is not accorded within six months, the appointment will cease to be valid.

"Sub-clause (2) provides for some measure of control being exercised by the general meeting in respect of appointments of sole selling agents made before, and in force when, this Bill comes into operation" (*vide* J.C.R., para 104).

**295. Loans to directors, etc.—**(1) Save as otherwise provided in sub-section (2), no company (hereinafter in this section referred to as "the lending company") shall, without obtaining the previous approval of the Central Government in that behalf, make any loan to, or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by,—

(a) any director of the lending company or of a company which is its holding company or any partner or relative of any such director;

(b) any firm in which any such director or relative is a partner;

(c) any private company of which any such director is a director or member;

(d) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors together; or

(e) any body corporate, the Board of directors, managing director, managing agent, secretaries and treasurers, or manager whereof is accustomed to act in accordance with

the directions or instructions of the Board, or of any director or directors, of the lending company.

(2) Sub-section (1) shall not apply to any loan made, guarantee given or security provided—

(a) by a private company unless it is a subsidiary of a public company;

(b) by a banking company;

(c) by a holding company to its subsidiary; or

(d) by a company which is the managing agent or secretaries and treasurers of another company to the latter.

(3) Where any loan made, guarantee given or security provided by a lending company and outstanding at the commencement of this Act could not have been made, given or provided, without the previous approval of the Central Government, if this section had then been in force, the lending company shall, within six months from the commencement of this Act or such further time not exceeding six months as the Central Government may grant for that purpose, either obtain the approval of the Central Government to the transaction or enforce the repayment of the loan made, or in connection with which the guarantee was given or the security was provided, notwithstanding any agreement to the contrary.

(4) Every person who is knowingly a party to any contravention of sub-section (1) or (3), including in particular any person to whom the loan is made or who has taken the loan in respect of which the guarantee is given or the security is provided, shall be punishable either with fine which may extend to five thousand rupees or with simple imprisonment for a term which may extend to six months:

Provided that where any such loan, or any loan in connection with which any such guarantee or security has been given or provided by the lending company, has been repaid in full, no punishment by way of imprisonment shall be imposed under this sub-section; and where the loan has been re-paid in part, the maximum punishment which may be imposed under this sub-section by way of imprisonment shall be proportionately reduced.

(5) All persons who are knowingly parties to any contravention of sub-section (1) or (3) shall be liable, jointly and severally, to the lending company for the repayment of the loan or for making good the sum which the lending company may have been called upon to pay in virtue of the guarantee given or the security provided by such company.

(d) No officer of the lending company or of the borrowing body corporate shall be punishable under sub-section (4) or shall incur the liability referred to in sub-section (5) in respect of any loan made, guarantee given or security provided in contravention of clause (d) or (e) of sub-section (1), unless at the time when the loan was made, the guarantee was given or the security was provided by the lending company, he knew or had express notice that that clause was being contravened thereby.

This section corresponds to s. 86D of the previous Act and is based on para 106 and the redraft of s. 86D at page 362 of the C.L.C.R. Cl. (iv) of sub s. (1) of the redraft has been split up into two. Where the directors control the exercise of not less than 50 per cent. of the total voting power of a public company, the prohibition will apply automatically. In other cases, that is, where the directors control less than 50 per cent of the total voting power, it will be open to the Government to declare that the directors have sufficient control over the company to make the application of the clause reasonable in the circumstances of the case--  
*Notes on Clauses.*

The C. L. C. R. state : "The Cohen Committee observed : 'We consider it undesirable that directors should borrow from the company. If the director can offer good security, it is no hardship to him to borrow from other sources. If he cannot offer good security it is undesirable to obtain from the company credit which he would not be able to obtain elsewhere'.

"We should recommend that the prohibition contained in s. 86D of the Indian Act should be extended to a public company, the managing agent, manager or directors of which are accustomed to act in accordance with the directions or instructions of any director of the lending company. The object of this enlargement of the scope of the present section is to cover loans given to those companies which although registered as public companies, are really private companies. A director of the lending company may not ostensibly be associated with the management of the borrowing company but he may be the moving spirit behind it. We realize that it may not be easy to prove this in all cases but we feel that this provision coupled with our recommendations about investigation of the affairs of a company and of the ownership of its shares would prove useful in appropriate cases. In the redraft of this section (*vide* item 11 of the Addendum to the Annexure of our Report) we have provided for an enhanced penalty for the contravention of the provisions of this section and also for the recovery of any moneys paid in contravention of this section and a corresponding reduction in the penalty where such recovery has been partially made" (para 106, C.L.C.R.)

This was originally cl. 273 of the Bill in which alterations have been made by the Joint Committee with the following observation : "The Committee are of opinion that where any loan given or any guarantee or security provided by a company, which is outstanding at the commencement of this Bill, could not have been given or provided without the prior approval of the Central Government if the provisions of this clause had then been in force, the company should obtain the approval of the Central Government to the transaction within a period of six months from the commencement of this Bill.

"A new sub-clause has accordingly been inserted in this clause" (*vide* J.C.R., para 105).

**1050. SUB-S. (2) :** The exclusion of sub-s. (1) from banking companies under this sub-section makes it clear that loans to directors of a bank are contem-

plated as part of its business (73). There is also no prohibition against a banking company lending money to concerns of which a director of the bank is also a director. There are certain prohibitions under this section; but these prohibitions do not apply to banking companies (74).

**1051. SUB-S. (4) :—**In contravention of the provisions of this section the directors sanctioned a loan to accused No. 2, who was a director, for a period of one year. Before the year was out the complainant moved his fellow directors to cancel the earlier resolution. They refused to do this and resolved that as the year had not elapsed, they would not interfere. The complainant thereupon filed a complaint under this sub-section. The Registrar was approached but he refused to intervene : *Held* that the parties to both the resolutions acted wrongly and the Registrar should have taken action in the matter. The Court however did not think it necessary to intervene at the instance of a private party and to punish the different accused persons for something done in 1939, especially as the loan had been repaid and no fresh breach under this section had been committed (75).

**296. Saving regarding book-debts.**—Nothing contained in section 295 shall apply to a book-debt which is required to be treated by virtue of the provision contained in that behalf in Schedule VI as a loan or an advance for the purpose of preparing the balance sheet of the company, unless the transaction represented by the book-debt was from its inception in the nature of a loan or an advance.

This section is new. The mere fact that for the purpose of the balance sheet, a book debt is required to be treated as a loan or an advance should not make the provisions of s. 273 (now s. 295) applicable, unless it is clear that the transaction represented by the book credit was, from the very inception in the nature of a loan or an advance—*Notes on Clauses*.

**297. Board's sanction to be required for certain contracts in which particular directors are interested.**—(1) Except with the consent of the Board of directors of a company, a director of the company or his relative, a firm in which such a director or relative is a partner, any other partner in such a firm, or a private company of which the director is a member or director, shall not enter into any contract with the company—

(a) for the sale, purchase or supply of any goods, materials or services; or

(b) after the commencement of this Act, for underwriting the subscription of any shares in, or debentures of, the company.

(2) Nothing contained in clause (a) of sub-section (1) shall affect any contract or contracts for the sale, purchase or supply

(73) *Albuquerque v. Catholic Bank* [1942] M. 737, [1942] 2 M.L.J. 307, 55 M.L.W. 532.

(74) *Bank of Commerce Ltd.* [1949] 53 C.W.N. 662.

(75) *Subbier v. Lakshmina* [1942] M. 452, [1942] 1 M.L.J. 520, [1942] M.W.N. 296.

of any goods, materials or services in which either the company, or the director, firm, partner or private company, as the case may be, regularly trades or does business, provided that the value of such goods and materials and the cost of such services do not exceed five thousand rupees in the aggregate in any calendar year comprised in the period of the contract or contracts.

(3) The consent of the Board required by sub-section (1) shall not be deemed to have been given within the meaning of that sub-section, unless the consent is accorded—

(a) by a resolution passed at a meeting of the Board; and

(b) before the contract is entered into, or within two months of the date on which it was entered into.

(4) Where such consent is not accorded to the contract before it is entered into, anything done in pursuance of the contract shall, if such consent is ultimately not accorded, be voidable at the option of the Board.

(5) Sub-sections (3) and (4) shall not apply to any case where consent has been accorded to the contract before the commencement of this Act.

This section corresponds to s. 86F of the previous Act. It is based on para 108 of the C.L.C.R. Sub-s. (2) makes the section inapplicable where the transaction relates to goods or materials which are the subject of trading either by the company or by the director or other party concerned. In such cases, within the limit laid down, *viz.*, that the value of the goods or the materials involved should not exceed Rs. 1,000 in one calendar year, the clauses will not apply. Where the requisite consent is not accorded the contract will be voidable at the option of the directors—*Notes on Clauses.*

"We suggest that contracts for underwriting subscription or purchase of shares and debentures of the company should also be brought within the scope of this section. We need hardly add that the amendment of the section (s. 86F of the old Act) which we propose should not extend to contracts already in existence (para 108 of the C.L.C.R.).

In sub-s. (2) "five thousand rupees" has been substituted for "one thousand rupees" and some other changes have been made in this section by the Joint Committee.

1052. In enacting s. 86F of the old Act the legislature wanted to suppress a particular mischief. It wanted that while occupying a responsible position in the company, the director should not be placed in a situation where there would be a conflict between his interest and his duty and that he does not obtain undue benefit by entering into profitable contracts with the company (76). The word "consent" in the expression "except with the consent of the Board of directors" does not contemplate a general consent but refers to a particular or specific contract or contracts. This section requires that the Board of directors should consider both the nature of the contract and also, the case of the particular director who wants to enter into the contract before the consent is given (76). In the last cited case



the respondent, a director of the appellant company wanted to enter into a contract with the company for the supply of one tin of ghee, and the question arose whether by reason of entering into this contract he had ceased to be a director of the company under s. 86I (h) of the old Act. Their Lordships held that he did. But see the undernoted case where it has been held by the Allahabad High Court that a director might write letters to his co-directors asking for their consent and if each director sitting at his home wrote back giving consent, the requirements of law would have been fulfilled (77). Under the present section a resolution of the Board is necessary.

**298. Power of directors to carry on business when managing agent or secretaries and treasurers are deemed to have vacated office, etc.—**

Where in pursuance of any provisions contained in this Act, the managing agent or secretaries and treasurers of a company are deemed to have vacated or to have been suspended from office, or are removed or suspended from office, or cease to act or to be entitled to act as managing agent or secretaries and treasurers, or where a permanent or temporary vacancy has otherwise occurred in the office of managing agent or secretaries and treasurers, then notwithstanding anything contained in this Act, the Board of directors shall have power to carry on, or arrange for the carrying on of, the affairs of the company until the managing agent or secretaries and treasurers again become entitled to act as such, or until the company in general meeting resolves otherwise.

This section is new. It is intended to give power to the directors to carry on the business of the company when there is a permanent or temporary vacancy in the office of the managing agent. This will remove all doubts as to the capacity of the directors to function in such cases—*Notes on Clauses*.

*Procedure, etc., where Director interested*

**299. Disclosure of interests by director.**—(1) Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company, shall disclose the nature of his concern or interest at a meeting of the Board of directors.

(2) (a) In the case of a proposed contract or arrangement, the disclosure required to be made by a director under sub-section (1) shall be made at the meeting of the Board at which the question of entering into the contract or arrangement is first taken into consideration, or if the director was not, at the date of that meeting, concerned or interested in the proposed contract or arrangement, at the first meeting of the Board held after he becomes so concerned or interested.

(b) In the case of any other contract or arrangement, the required disclosure shall be made at the first meeting of the Board held after the director becomes concerned or interested in the contract or arrangement.

(3) (a) For the purposes of sub-sections (1) and (2), a general notice given to the Board by a director, to the effect that he is a director or a member of a specified body corporate or is a member of a specified firm and is to be regarded as concerned or interested in any contract or arrangement which may, after the date of the notice, be entered into with that body corporate or firm, shall be deemed to be a sufficient disclosure of concern or interest in relation to any contract or arrangement so made.

(b) Any such general notice shall expire at the end of the financial year in which it is given, but may be renewed for further periods of one financial year at a time, by a fresh notice given in the last month of the financial year in which it would otherwise expire.

(c) No such general notice, and no renewal thereof, shall be of effect unless either it is given at a meeting of the Board, or the director concerned takes reasonable steps to secure that it is brought [up and read at the first meeting of the Board after it is given].

(4) Every director who fails to comply with sub-section (1) or (2) shall be punishable with fine which may extend to five thousand rupees.

(5) Nothing in this section shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contracts or arrangements with the company.

This section is based on s. 91A of the previous Act, s. 199 of the English Act of 1948, and paras 96 and 97 of the C.L.C.R. and also pages 292 and 293 of the Report—*Notes on Clauses*.

Some changes have been made in this section by the Joint Committee.

The words within square brackets towards the end of cl. (c) of sub-s. (3) were apparently left out by mistake in both the Gazette and the Government publication of the Act. They occur in the Bill as reported on by the Joint Committee.

**1053. Scope :—**There was no conflict between s. 86F (see s. 297 of the present Act) and s. 91A (s. 299 of the present Act) of the old Act. The subject matter of s. 91A was the disclosure of interest by directors and the consequence of contravention thereof was that the director was liable to a fine. The consequence of contravention of s. 86F was more drastic because under s. 86I (h) of the old Act the office of the director became vacant (78).

**1054. Principle :—**SS. 299, 300, 302 and 416 are founded upon the principle that "a director is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or a sole director" (79). A director is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company (80). So, if acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company (80).

"The liability of a director", observed Lord Blanesburgh, "in respect of profits made by him from a contract in which his company is also concerned is one thing : his liability, if any there be, in respect of his profits from a contract in which the company has no interest at all is quite another. In the first case, unless by the company's regulations the director is permitted, subject to or without conditions, to retain his profit, he must account for it to the company. In the second case the company has no concern in his profit and cannot make him accountable for it unless it appears—this is the essential qualification—that in earning that profit he has made use either of the property of the company or of some confidential information which has come to him as a director of the company" (81).

**1055. Disclosure of interest :—**The contracts contemplated by this section in respect of which every director must disclose his interest, if any, on pain of penalty provided for in sub-s. (4) are not only contracts entered into a meeting of directors, but all contracts entered into at such meeting or otherwise (82). Such contracts include small purchases from another firm in which the purchasing director is interested (82). A letter addressed to the chairman of the Board of directors signed by him with the remark "noted" and included in one of the files of the directors' correspondence, but not referred to in the minutes of any meeting, does not, of itself, prove disclosure as required by this section (82).

**1056. Nature of interest :—**The interest which a director is bound to disclose is any interest which conflicts with his duty to the company. Whether the interest is of such a nature or not must be a question of fact in each case and decided on a reference to the wording of each statute (83). The interest requiring disclosure is not only a pecuniary interest, but every relation which can reasonably be regarded as capable of affecting the directors' decision (84). Where the real nature of the interest is known to all the directors, there is no necessity to make a formal disclosure (84).

**1057. Rule of equity will also apply :—**Where the articles declared that if a director had any interest in a contract proposed for acceptance by the company, he should declare his interest or his place as director should be vacated and that having declared it he should not vote on the proposal, it was held *first*, that the expression "declare his interest" meant declare the nature of his interest (85), and

(79) *North-West Transportation Co. v. Beatty* [1887] 12 App. Cas. 589; see also *Boulton Bros. v. New Victoria Mills* [1929] A. 87, 26 A.L.J. 1119; *Ramaswami v. Madras T. P. & Publishing Firm* [1915] 38 Mad. 991.

(80) *Imperial M. C. Association v. Coleman* [1873] 6 H.L. 189.

(81) *Bell v. Lever Brothers Ltd.* [1932] A.C. 161 at p. 194.

(82) *Rabindra v. Emperor* [1938] 42 C.W.N. 533.

(83) *Venkata Chalapathi v. Guntur Cotton & C. Mills* [1929] M. 353, 115, I.C. 486 [see *Guntur Cotton & C. Mills v. Venkata Chalapathi* (1932) P.C. 244 in which an appeal from this case was dismissed].

(84) *Ibid.*

(85) *Turnbull v. West Riding Athletic Club* [1894] W.N. 4, 70 L.T. 92.

that the words were not satisfied by a mere declaration that he had an interest in the matter, and *secondly* that the vacating of the seat would not prevent the contract itself from being treated as one made for the benefit of the company; for the rule of equity would apply to such a case in addition to the penalty specially mentioned by the article (86).

If the words are "if he is concerned in any contract", the director will be disqualified even though he could not make any profit out of the contract (87).

**1058. Borrowing from director :—**A company is entitled to borrow from one of its directors, but that is subject to the fundamental position that the director, even though disclosing his interest, does not take undue advantage of his position, because fundamentally the position of a director is very like that of a trustee, so the transaction must be fair and proper (88).

**1059. Directors holding shares in any other company :—**Unless and so far as authorized by the articles, the Board cannot make a binding contract with any other company in which a member of the quorum holds shares (89). This rule applies whether the shares are held in trust or beneficially. If the second company has notice of the irregularity, the first company may obtain rescission of the transaction, even after completion, provided that rescission is still possible (89).

**1060. Where vendors become directors :—**Where vendors become directors, they usually enter into agreements to manage for a term of years and agree not to trade in competition with the company. If the company wrongfully discharges such a manager either directly or by going into liquidation, he is freed from his covenant and may at once start a competing business (90).

**1061. Terms of articles must be strictly complied with :—**Modern articles usually authorize directors to make contracts in which they are personally interested, on disclosing their interest to their fellow-directors. Such a clause is valid under the English law but the terms must be strictly complied with (91), and the disclosure must be to directors who are independent and not to other directors who are equally interested in the contract in question (92).

**1062. Breach of ss. 299, 300 and 302 :—**A breach of the provisions of ss. 299, 300 and 302 by which a director is bound to disclose any interest he has personally in a transaction that the company is entering into does not *ipso facto* render the transaction void (93).

**1063. SUB-S. (4) :—**Where the managing director of a book-selling company makes a small purchase of books from another concern in which he is interested and does not disclose his interest as required by this section, he is guilty under sub-s. (4) (94).

**300. Interested director not to participate or vote in Board's proceedings. —(1)** No director of a company shall, as a director, take any part in the discussion of, or vote on, any contract or arrange-

(86) *Imperial M. C. Assn. v. Coleman*, supra.

(87) *Star Steam Laundry Co. v. Dukas* [1913] W.N. 39, 108 L.T. 367.

(88) *Kashinath v. New A. C. G. & Pressing Co.* [1951] N. 255, [1950] Nag. 582.

(89) *Transvaal Lands Co. v. New Belgian L. & D. Co.* [1914] 2 Ch. 488.

(90) *General Bill-posting Co. v. Atkinson* [1909] A.C. 118; *Measures Brothers Ltd. v. Measures* [1910] 2 Ch. 336.

(91) *Toms v. Cinema Co.* [1915] W.N. 29; *Costa Rica Ry. Co. v. Forwood* [1900] 1 Ch. 756, on appeal [1901] 1 Ch. 746.

(92) *Lagunas Nitrate Co. v. Langunas Nitrate Syndicate* [1899] 2 Ch. 392; *Gluckstein v. Barnes* [1900] A.C. 240.

(93) *Venkata Chalapathi v. Guntur Cotton & C. Mills* (supra).

(94) *Rabindra v. Emperor* (supra).

ment entered into, or to be entered into, by or on behalf of the company, if he is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement; nor shall his presence count for the purpose of forming a quorum at the time of any such discussion or vote; and if he does vote, his vote shall be void.

(2) Sub-section (1) shall not apply to—

(a) a private company which is neither a subsidiary nor a holding company of a public company;

(b) a private company which is a subsidiary of a public company, in respect of any contract or arrangement entered into, or to be entered into, by the private company with the holding company thereof;

(c) any contract of indemnity against any loss which the directors, or any one or more of them, may suffer by reason of becoming or being sureties or a surety for the company;

(d) any contract or arrangement entered into or to be entered into with a public company, or a private company which is a subsidiary of a public company, in which the interest of the director aforesaid consists solely in his being a director of such company and the holder of not more than shares of such number or value therein as is requisite to qualify him for appointment as a director thereof, he having been nominated as such director by the company referred to in sub-section (1); or

(e) a public company, or a private company which is a subsidiary of a public company, in respect of which a notification is issued under sub-section (3), to the extent specified in the notification.

(3) In the case of a public company or a private company which is a subsidiary of a public company, if the Central Government is of opinion that having regard to the desirability of establishing or promoting any industry, business or trade, it would not be in the public interest to apply all or any of the prohibitions contained in sub-section (1) to the company, the Central Government may, by notification in the Official Gazette, direct that that sub-section shall not apply to such company, or shall apply thereto subject to such exceptions, modifications and conditions as may be specified in the notification.

(4) Every director who knowingly contravenes the provi-

sions of this section shall be punishable with fine which may extend to five thousand rupees.

This section is based on s. 91B of the previous Act and para 98 of the C.L.C.R. Not only voting but also participation in the discussion is prohibited to directors who are concerned or interested—*Notes on Clauses*.

"We consider that persons holding the position of directors should possess sufficient integrity and independence of judgment not to be influenced by the mere presence of one of their colleagues at a meeting of the board. We have however provided that the interested director should not take part in the proceedings of such meeting. Our other recommendation that the quorum at board meetings should either be two directors or one-third of the number of directors whichever is higher, which we have made later on in this chapter, would however operate as a further safeguard, by doing away with the present practice of incorporating into articles of association clauses constituting one single director as a quorum when other directors are interested" (para 98 of the C.L.C.R.).

Cl. (d) of sub-s. (2) of this section has been altered by the Lok Sabha.

**1064. Application :—**Where a director has an interest as shareholders in another company, or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in this section and the transaction is voidable at the instance of the company with which it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others (95).

The corresponding s. 91B of the previous Act did not apply to a private company by virtue of sub-s. (3) thereof. Where therefore the articles of a private company did not contain a clause against including an interested director for the purpose of forming the quorum of the meeting, the meeting in which the necessary quorum was completed by including the interested director, was valid and the consent given by the votes of the other directors was a valid consent (96). The present section makes sub-s. (1) thereof inapplicable only to a private company which is neither a subsidiary nor a holding company of a public company. See sub-s. (2).

**1065. Voting on the question at general meeting :—**Unless specially authorized by the articles, directors cannot make contracts with the company either on their own behalf or on behalf of any company or firm, without the sanction of the company in general meeting (97). This does not necessarily prevent them from voting on the same question at a meeting of shareholders (98). They cannot even issue debentures to themselves as security for money advanced (99), or allot shares to themselves (1).

It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set off against future calls. But where he is himself a director and the managing agent, he cannot validly vote for a resolution authorising such

(95) *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd.* [1938] P.C. 159. [1938] Bom. 421, 42 C.W.N. 733. (P.C.).

(96) *Mahesh Co. v. Oil Mills Ltd.* (1955) N.U.C. 3376 (All.).

(97) *Transvaal Lands Co. v. New Belgian L. & D. Co.* (supra); *Parker v. McKenna* [1874] 10 Ch. App. 96.

(98) *North-West Transportation Co. v. Beatty* (supra); *Burland v. Earle* [1902] A.C. 83 at p. 94; but see *Cook v. Deaks* [1916] 1 A.C. 554.

(99) *Cox v. Dublin City Distillery No. 2* [1915] 1 I.R. 345.

(1) *Neal v. Quinn* [1916] W.N. 223.

set off. The resolution would be invalid when the necessary quorum is lacking without such director's presence. Such a shareholder can therefore on liquidation be placed in the list of contributories in respect of an unpaid share money (2).

**1066. Voting at directors' meeting :—**Where the directors vote in favour of a resolution allotting shares to themselves and other persons, such a resolution is bad so far as it relates to any allotment to the directors voting in respect thereof, and an interlocutory injunction will be granted restraining such directors from exercising voting powers in respect of the shares so allotted to them, but the resolution as a whole is not bad and the allotments to persons other than directors are valid (3). Voting by an interested director for a transaction in which he is interested, will not *per se* render the contract either void or voidable. But non-disclosure or voting when but for the vote the contract would not have been sanctioned, will in all cases render the interested director liable to account for "secret profits" (4).

If two directors are interested in a transaction, the objection will not be removed by splitting up the resolution and each director voting only on the part affecting the other (39). A resolution reducing the quorum for the purpose of enabling those not interested to pass the resolution is invalid (5).

A resolution authorizing the issue of debentures in which the directors are personally interested is a nullity; but the company may be estopped by circumstances from alleging the invalidity of the debentures (6).

**1067. Quorum :—**No director is entitled to join in forming a quorum for the consideration of matters in respect of which he is not entitled to vote (7). At a Board meeting at which D, a director, was not present, a resolution was passed for the issue of debentures for D as security for all moneys due or to become due from the company to D and Y (another director). There was no entry in the minute book that Y did not act or vote in relation to this resolution, but evidence was adduced to show that at the same meeting a previous resolution was passed that the quorum of directors shall be reduced to two, so as to enable the resolution for the issue of debentures to be passed by the two other directors present. *Held* that the resolution for the issue of debentures was invalid for want of a disinterested quorum and that the resolution for reduction of the quorum, if in fact passed, was itself invalid as it was passed only for the purpose of enabling Y to obtain an interest in the company's property (8).

**1068. Articles under Act VI of 1882 :—**Although this section and the previous one impose a penalty, articles adopted under the Act of 1882, though unamended after the passing of the previous Act, were not rendered *ultra vires* nor the contract void thereby (9).

**1069. Effect of non-disclosure of interest :—**Non-disclosure of the interest of a director or voting by him would not under the previous Act *per se* render the contract voidable, but would render the interested director liable to account for secret profits (10).

(2) *Pandalai v. South Indian General Assurance Co.* [1942] M. 95, [1941] 2 M.L.J. 595, [1942] Mad. 230, 201 I.C. 374.

(3) *Neal v. Quinn* [1916] W.N. 223.

(4) *Venkata Chalapathi v. Guntur Cotton & Mills* [1929] M. 353, 115 I.C. 480. See [1932] P.C. 244 where an appeal from this decision was dismissed by the Privy Council.

(5) *North Eastern Insurance Co.* [1915] W.N. 210, 31 T.L.R. 428.

(6) *Victors Ltd. v. Lingard* [1927] 1 Ch. 323.

(7) *In re Sir Hormusji A. Wadia* [1921] 23 Bom. L.R. 1104; *North Eastern Insurance Co.* [1919] 1 Ch. 198.

(8) *North-Eastern Insurance Co.* [1919] 1 Ch. 198.

(9) *Venkata Chalapathi v. Guntur Cotton & Mills* [1929] M. 353, [1928] M.W.N. 481.

(10) *Ibid.*

Where the interest of a director in the contract is such that it is likely to produce a conflict between his duty to the company and his duty or interest in the other party to the contract, he is bound to disclose it; but if the whole body of the directors was already aware of such interest, formal disclosure was not necessary (11).

**1070. Pleading** :--In a charge of non-disclosure by a director of his interest in a particular contract or transaction the pleading must not only include allegations of existence of such interest, but also the fact or allegation of non-disclosure, or in other words, the breach of the obligation (12).

**1071. Internal management** :--The principle of the English law as to internal management applies to a case of disability of directors arising under this section. The reason for the rule is that it would be disastrous in a business community if contracts made with companies would be impeached on account of matters known to the company, but not known to the other contracting party (13). So this section will not deprive a third party of the benefit of his contract with the company who has no notice of the defect in the director's authority. Such a person will be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him (14).

**301. Register of contracts, companies and firms in which directors are interested.**—(1) A register shall be kept by every company, in which shall be entered particulars of all contracts or arrangements to which section 297 or 299 applies, including the following particulars, namely:—

- (a) the date of the contract or arrangement;
- (b) the names of the parties thereto;
- (c) the principal terms and conditions thereof;
- (d) the date on which it was placed before the Board;
- (e) the names of the directors voting for and against the contract or arrangement and the names of those remaining neutral.

(2) Particulars of every such contract or arrangement shall be entered in the register aforesaid within three days of the meeting of the Board at which the contract or arrangement is approved; and the register shall be placed before the next meeting of the Board and shall then be signed by all the directors present at that meeting.

(3) The register aforesaid shall also specify, in relation to each director of the company, the names of the bodies corporate and firms of which notice has been given by him under sub-section (3) of section 299.

(11) Ibid, and see also *Imperial M. C. Assn. v. Coleman* [1871] 6 Ch. App. 558; *Costa Rica Ry. Co. v. Forwood* (supra).

(12) *Venkata Chalapathi v. Guntur Cotton & C. Mills*, (supra) per Srinivasa Ayyangar.

(13) *T. R. Pratt (Bombay) Ltd. v. E. D. Sassoon & Co.* [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.

(14) *T. R. Pratt (Bombay) Ltd. v. M. T. Ltd.* (Note 95, supra).



(4) If default is made in complying with the provisions of sub-section (1), (2) or (3), the company, and every officer of the company who is in default, shall, in respect of each default, be punishable with fine which may extend to five hundred rupees.

(5) The register aforesaid shall be kept at the registered office of the company; and it shall be open to inspection at such office, and extracts may be taken therefrom and copies thereof may be required, by any member of the company to the same extent, in the same manner, and on payment of the same fee, as in the case of the register of members of the company; and the provisions of section 163 shall apply accordingly.

This section is new. Herein provision has been made for the maintenance of a register as in s. 91A (3) of the previous Act—*Notes on Clauses*.

Some changes have been made in this section by the Joint Committee which has inserted sub-s. (3) therein.

**302. Disclosure to members of director's interest in contract appointing manager, managing director, managing agent or secretaries and treasurers.—**(1) Where a company--

(a) enters into a contract for the appointment of a manager of the company, in which contract any director of the company is in any way, whether directly or indirectly, concerned or interested; or

(b) varies any such contract already in existence and in which a director is concerned or interested as aforesaid; the company shall, within twenty-one days from the date of entering into the contract or of the varying of the contract, as the case may be, send to every member of the company an abstract of the terms of the contract or variation, together with a memorandum clearly specifying the nature of the concern or interest of the director in such contract or variation.

(2) Where a company enters into a contract for the appointment of a managing director of the company, or varies any such contract which is already in existence, the company shall send an abstract of the terms of the contract or variation to every member of the company within the time specified in sub-section (1); and if any other director of the company is concerned or interested in the contract or variation, a memorandum clearly specifying the nature of the concern or interest of such other director in the contract or variation shall also be sent to every member of the company with the abstract aforesaid.

(3) Where a company proposes to enter into a contract for

the appointment of a managing agent or of secretaries and treasurers, in which contract any director of the company is concerned or interested as aforesaid, or proposes to vary any such contract already in existence in which a director is concerned or interested as aforesaid, the company shall send the abstract and memorandum referred to in sub-section (2) to every member of the company, in sufficient time before the general meeting of the company at which the proposal is to be considered.

(4) Where a director becomes concerned or interested as aforesaid in any such contract as is referred to in sub-section (1), (2) or (3) after it is made, the abstract and the memorandum, if any, referred to in the said sub-section shall be sent to every member of the company within twenty-one days from the date on which the director becomes so concerned or interested.

(5) If default is made in complying with the foregoing provisions of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

(6) All contracts entered into by a company for the appointment of a manager, managing director, managing agent or secretaries and treasurers, shall be kept at the registered office of the company; and shall be open to the inspection of any member of the company at such office; and extracts may be taken therefrom and copies thereof may be required by any such member, to the same extent, in the same manner and on payment of the same fee, as in the case of the register of members of the company; and the provisions of section 163 shall apply accordingly.

(7) The provisions of this section shall apply in relation to any resolution or proposed resolution of the Board of directors of a company appointing a manager or a managing or whole-time director, or varying any previous contract or resolution of the company relating to the appointment of a manager or a managing or whole-time director, as they apply in relation to any contract or proposed contract for the like purpose.

This section corresponds to s. 91C of the previous Act. It implements the following recommendation of the C. I. C. R. : "As regards s. 91C of the Act we propose that the whole section should be extended to contracts or arrangements for the appointment of managing directors. We also recommend that a provision should be made for the supply to any member of the company, who may ask for it, a copy of the relevant contract on payment of a fee of six annas per hundred words" (para 99 of the C. I. C. R.).

Some changes have been made in this section too by the Joint Committee, especially in sub-s. (4). Sub-s. (7) has been added by the Lok Sabha.

**1072. What is a contract within this section :—**The appointment by the directors of one of their body as chairman or as managing director without remuneration is not a contract within the meaning of this section, being merely a delegation of power; but where a resolution is passed at a Board meeting that one of the directors be appointed managing director at a remuneration and that director is present and accepts the appointment, there is a contract between the company and the director, and the latter should not vote in support of the resolution (15). Allotment of shares has also been held to be such a contract (16).

**1073. Interest :—**The interest requiring disclosure is not only pecuniary interest, but every relation that can reasonably be regarded as capable of affecting the directors' decision (17).

**1074.** A breach of this section does not *ipso facto* render the transaction void or voidable (18).

### *Register of Directors, etc.*

**303. Register of directors, managing agents, secretaries and treasurers etc.—**(1) Every company shall keep at its registered office a register of its directors, managing director, managing agent, secretaries and treasurers, manager and secretary, containing with respect to each of them the following particulars, that is to say:—

(a) in the case of an individual, his present name and surname in full; any former name or surname in full; his usual residential address; his nationality; and, if that nationality is not the nationality of origin, his nationality of origin; his business occupation, if any; if he holds the office of director, managing director, managing agent, manager or secretary in any other body corporate, the particulars of each such office held by him; and except in the case of a private company which is not a subsidiary of a public company, the date of his birth;

(b) in the case of a body corporate, its corporate name and registered or principal office; and the full name, address, nationality, and nationality of origin, if different from that nationality, of each of its directors; and if it holds the office of managing agent, secretaries and treasurers, manager or secretary in any other body corporate, the particulars of each such office;

(c) in the case of a firm, the name of the firm, the full name, address, nationality, and nationality of origin, if different from that nationality, of each partner; and the

(15) *Foster v. Foster* [1916] 1 Ch. 532.

(16) *Quinn v. Robb* [1916] 141 L.T. Jo. 6.

(17) *Venkata Chalapati v. Guntur Cotton & Co. Mills* [1929] M. 353, 115 I.C. 486.

(18) *Ibid.*

date on which each became a partner; and if the firm holds the office of managing agent, secretaries and treasurers, manager or secretary in any other body corporate, the particulars of each such office;

(d) if any director or directors have been nominated by a body corporate, its corporate name; all the particulars referred to in clause (a) in respect of each director so nominated, and also all the particulars referred to in clause (b) in respect of the body corporate;

(e) if any director or directors have been nominated by a firm, the name of the firm, all the particulars referred to in clause (a) in respect of each director so nominated, and also all the particulars referred to in clause (c) in respect of the firm.

*Explanation.*—For the purposes of this sub-section—

(1) any person in accordance with whose instructions, the Board of directors of a company is accustomed to act shall be deemed to be a director of the company;

(2) in the case of a person usually known by a title different from his surname, the expression “surname” means that title; and

(3) references to a former name or surname do not include—

(i) in the case of a person usually known by an Indian title different from his surname, the name by which he was known previous to the adoption of, or succession to, the title;

(ii) in the case of any person, a former name or surname, where that name or surname was changed or disused before the person bearing the name attained the age of eighteen years, or has been changed or disused for a period of not less than twenty years; and

(iii) in the case of a married woman, the name or surname by which she was known previous to the marriage.

(2) The company shall, within the periods respectively mentioned in this sub-section, send to the Registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managing directors, managing agents, secretaries and treasurers, managers or secretaries or in any of

the particulars contained in the register, specifying the date of the change.

The period within which the said return is to be sent shall be a period of twenty-eight days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be twenty-eight days from the happening thereof.

(3) If default is made in complying with sub-section (1) or (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section is based on s. 87 of the previous Act, s. 200 of the English Act of 1948 and recommendation of the C. I. C. in para 112 of their Report—*Notes on Clauses*.

Some changes have been made in this section by the Joint Committee.

**1075. Meaning of "manager":**—Unless a person is in charge of the entire business of a company, he cannot be deemed to be the "manager" thereof. A person in charge of a branch bank therefore does not come within the purview of the term "manager" as used in this section (19). See notes to s. 2 (24) *ante*.

**1076. Outsiders not bound to search registers:**—Outsiders are not affected with notice of all that is contained in the register of directors kept under this section (20). Notwithstanding the provisions of this section, the appointment of a director still remains part of "the indoor management" of the company, and outsiders are not bound to search the register for ascertaining whether a person acting as a director for some length of time is also a director *de jure* (20).

**1077. Sub-s. (3):** Where a statutory duty is cast upon a company to do something, it must take steps to see that it is aware of all the changes it has to notify to the Registrar, and if it fails to do so, then the company becomes liable for the default (21). The scheme of penalties in the Act makes the company liable for every default without proof of negligence. Hence no distinction can be made between facts which are available from the records of the company and facts which are not (21).

The word "who" refers only to an officer of the company and not to the company, and the words "knowingly and wilfully" can only relate to a person and not to a company. So it is unnecessary in a case against the company for the prosecution to prove that anybody connected with the company had knowledge of the change (22).

**Forms:**—For the form of particulars of directors, etc. and for that of alteration in those particulars, pursuant to this section, see Form No. 32 and Form No. 33 respectively in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

(19) *Basant v. Emp.* [1917] 19 Cr. L. J. 215, 43 I.C. 791.

(20) *Pudumjee & Co. v. Moos* [1926] B. 28, 27 Bom. L.R. 1218, following *Mahony v. East Holyford Mining Co.* [1875] 7 H.L. 869; *T.R. Pratt & Co. (Bombay) Ltd. v. E. D. Sassoon & Co. Ltd.* [1936] B. 62, 37 Bom. L.R. 978, 161 I.C. 126.

(21) *Public Prosecutor v. Coimbatore National Bank* [1943] M. 214, [1943] 1 M.L.J. 119, [1942] M.W.N. 761.

(22) *Ibid*: *Public Prosecutor v. B. V. A. Lury & Co.* [1942] M. 75, 197 I.C. 265, [1941] M.W.N. 118 (Cr.), [1941] 2 M.L.J. 487.

**304. Inspection of the register.**—(1) The register kept under section 303 shall be open to the inspection of any member of the company without charge and of any other person on payment of one rupee for each inspection during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day are allowed for inspection.

(2) If any inspection required under sub-section (1) is refused,—

(a) the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees; and

(b) the Court may, by order, compel an immediate inspection of the register.

This section corresponds to sub-ss. (3), (4) and (5) of s. 87 of the previous Act and s. 200 (6), (7) and (8) of the English Act of 1948.

Some changes have been made in this section by the Joint Committee.

See notes to the last section.

**305. Duty of directors etc., to make disclosure.**—Every director [including a person deemed to be a director by virtue of the *Explanation* to sub-section (1) of section 303], managing director, managing agent, secretaries and treasurers, manager or secretary of any company, who is appointed to the office of director, managing director, managing agent, secretaries and treasurers, manager or secretary of any other body corporate shall, within twenty days of his appointment, disclose to the company aforesaid the particulars relating to the office in the other body corporate which are required to be specified under sub-section (1) of section 303; and if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees.

This section is new. It is consequential on and implements the provisions of cl. 281 (now s. 308)—*Notes on Clauses*.

**306. Register to be kept by Registrar and inspection thereof.**—

(1) The Registrar shall keep a separate register or registers in which there shall be entered the particulars received by him under sub-section (2) of section 303 in respect of companies, so however that all entries in respect of each such company shall be together.

(2) The register or registers aforesaid shall be open to inspection by any member of the public at any time during office hours, on payment of the prescribed fee.

This section also is new. It is consequential on sub-cl. (2) of cl. 281 (now s. 303). It will enable any member of the public to obtain essential information about the directors etc. of companies—*Notes on Clauses*.

**Form** :—For the form of register of directors, etc. to be kept by the Registrar in pursuance of this section, see Form No. 34 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

### *Register of Directors' Shareholdings.*

**307. Register of directors' shareholdings, etc.**—(1) Every company shall keep a register showing, as respects each director of the company, the number, description and amount of any shares in, or debentures of, the company or any other body corporate, being the company's subsidiary or holding company, or a subsidiary of the company's holding company, which are held by him or in trust for him, or of which he has any right to become the holder whether on payment or not.

(2) Where any shares or debentures have to be recorded in the said register or to be omitted therefrom, in relation to any director, by reason of a transaction entered into after the commencement of this Act and while he is a director, the register shall also show the date of, and the price or other consideration for, the transaction:

Provided that where there is an interval between the agreement for any such transaction and the completion thereof, the date so shown shall be that of the agreement.

(3) The nature and extent of any interest or right in or over any shares or debentures recorded in relation to a director in the said register shall, if he so requires, be indicated in the register.

(4) The company shall not, by virtue of anything done for the purposes of this section, be affected with notice of, or be put upon inquiry as to, the rights of any person in relation to any shares or debentures.

(5) The said register shall, subject to the provisions of this section, be kept at the registered office of the company, and shall be open to inspection during business hours (subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so that not less than two hours in each day are allowed for inspection) as follows:—

(a) during the period beginning fourteen days before the date of the company's annual general meeting and ending three days after the date of its conclusion, it shall be open

to the inspection of any member or holder of debentures of the company; and

(b) during that or any other period, it shall be open to the inspection of any person acting on behalf of the Central Government or of the Registrar.

In computing the fourteen days and the three days mentioned in this sub-section, any day which is a Saturday, a Sunday or a public holiday shall be disregarded.

(6) Without prejudice to the rights conferred by sub-section (5), the Central Government or the Registrar may, at any time, require a copy of the said register, or any part thereof.

(7) The said register shall also be produced at the commencement of every annual general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting.

If default is made in complying with this sub-section the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(8) If default is made in complying with sub-section (1) or (2), or if any inspection required under this section is refused, or if any copy required thereunder is not sent within a reasonable time, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees and also with a further fine which may extend to twenty rupees for every day during which the default continues.

(9) In the case of any such refusal, the Court may also, by order, compel an immediate inspection of the register.

(10) For the purposes of this section—

(a) any person in accordance with whose directions or instructions the Board of directors of a company is accustomed to act, shall be deemed to be a director of the company; and

(b) a director of a company shall be deemed to hold, or to have an interest or a right in or over, any shares or debentures, if a body corporate other than the company holds them or has that interest or right in or over them, and either—

(i) that body corporate or its Board of directors



is accustomed to act in accordance with his directions or instructions; or

(ii) he is entitled to exercise or control the exercise of one-third or more of the total voting power exercisable at any general meeting of that body corporate.

This section is new and is based on s. 195 of the English Act of 1948 which has been recommended for incorporation in para 100 of the C. I. C. R.—*Notes on Clauses*.

**308. Duty of directors and persons deemed to be directors to make disclosure of shareholdings.**—(1) Every director of a company, and every person deemed to be a director of the company by virtue of sub-section (10) of section 307, shall give notice to the company of such matters relating to himself as may be necessary for the purpose of enabling the company to comply with the provisions of that section.

(2) Any such, notice shall be given in writing, and if it is not given at a meeting of the Board, the person giving the notice shall take all reasonable steps to secure that it is brought up and read at the meeting of the Board next after it is given.

(3) Any person who fails to comply with sub-section (1) or (2) shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

This section is consequential on cl. 285 (now s. 307) and is based on s. 198 of the English Act of 1948—*Notes on Clauses*.

"In order that the provisions of this section (s. 307) may be enforced, it is necessary that an obligation should be imposed on the director of a company and on every person who is deemed to be a director to give notice to the company of all such matters relating to himself as are required under this section" (para 100 of the C. I. C. R.).

Some changes have been made in this section by the Joint Committee.

### *Remuneration of Directors*

**309. Remuneration of directors.**—(1) The remuneration payable to the directors of a company, including any managing or whole-time director, shall be determined, in accordance with and subject to the provisions of section 198 and this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting.

(2) A director may receive remuneration either by way of a monthly payment, or by way of a fee for each meeting attended, or partly by the one way and partly by the other.

(3) In lieu of or in addition to the remuneration specified in sub-section (2), remuneration may be paid to a director who is either in the whole-time employment of the company or a managing director, at a specified percentage of the net profits of the company:

Provided that such percentage shall not exceed five for any one such director, or where there is more than one such director, ten for all of them together.

(4) In the case of a director who is neither in the whole-time employment of the company nor a managing director and whose remuneration does not include anything by way of a monthly payment, the company may, by special resolution, authorise the payment, to such director, or where there is more than one such director, to all of them together—

(a) if the company has a managing or whole-time director, a managing agent or secretaries and treasurers, or a manager, of a commission not exceeding one per cent. of the net profits of the company;

(b) in any other case, of a commission not exceeding three per cent. of the net profits of the company.

(5) The net profits referred to in sub-sections (3) and (4) shall be computed in the manner referred to in section 198, sub-section (1).

(6) No director of a company who is in receipt of any commission from the company and who is either in the whole-time employment of the company or a managing director shall be entitled to receive any commission or other remuneration from any subsidiary of such company.

(7) The special resolution referred to in sub-section (4) shall not remain in force for a period of more than five years; but may be renewed, from time to time, by special resolution for further periods of not more than five years at a time:

Provided that no renewal shall be effected earlier than one year from the date on which it is to come into force.

(8) The provisions of this section shall come into force immediately on the commencement of this Act or, where such commencement does not coincide with the end of a financial year of the company, with effect from the expiry of the financial year immediately succeeding such commencement.

(9) The provisions of this section shall not apply to a private company unless it is a subsidiary of a public company.

This section is new. It is based on para 87 of the C.L.C.R. The maximum remuneration which may be paid to the managing director or director who is in the whole time employment of the company, by way of percentage of profits of the company, has been fixed at 5 per cent. [sub-s. (3)].—*Notes on Clauses.*

This was originally cl. 287 of the Bill in which alterations have been made by the Joint Committee with the following observation : "Sub-clause (1) has been amended so as to make it clear that the determination of the remuneration of the directors under the provisions of this clause should be in accordance with new clause 197 (now s. 198) which imposes an overall limit on managerial remuneration. The Committee consider that where there is more than one full time or managing director, the percentage of net profits payable to all of them may be raised to ten, taking into consideration the overall limit of eleven per cent. imposed by clause 197—(now s. 198). New sub-clause (5) provides for the manager in which the net profits should be computed for the purpose of this clause. In new sub-clause (8), the Committee have made an addition to provide for the case where the commencement of the Act does not coincide with the end of the financial year of the company" (*vide J. C. R., para 106*).

Detailed provision has been made in this section regarding the remuneration of directors.

The Lok Sabha has made alterations in sub-ss. (1) and (4) of this section.

For the provision of remuneration of a director under the previous Act, see reg. 69 of Table A of that Act, the case law under which is given below :

**1078. Power to fix directors' remuneration** :—When the remuneration of a director has been fixed by the company, the company has power to reduce his remuneration when it think fit (23). A company with power from time to time to fix the remuneration of the directors can discriminate between directors with regard to the amount of their remuneration (24). If the remuneration is provided in the articles it cannot be changed without a special resolution (25).

**1079. Director's right to remuneration** :—The directors are not trustees for the creditors of the company. They having acted *bona fide* in the interest of the company are entitled to vote themselves remuneration before the expiration of the year where the articles provide that their remuneration should be by way of annual salary (26). Where the articles provided : "The board shall be entitled to set apart and receive for their services a sum at the rate of £500 per annum for the chairman and £250 per annum for each other director, reckoned from the incorporation of the company, it was held by Rigby, L. J. that the setting apart of the money by a resolution of the board was not a condition precedent to the right of a director to receive the sum, and that the right was an absolute right (27).

**1080. Where no remuneration** :—Where the articles provided that the directors were to receive no remuneration until a dividend had been paid, and the directors took remuneration, they were held jointly and severally liable to repay the money with interest (28). Directors are not servants of the company and as such are not entitled to remuneration for their labour according to value, except in so far as it is provided in the articles (29).

(23) *Foster v. Foster* [1916] 1 Ch. 532.

(24) *Foster v. Foster* [1916] 1 Ch. 532.

(25) *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 148.

(26) *A. M. Wood's Ships' Woodite Protection Co.* [1892] 62 L.T. 760.

(27) *Nell v. Atlanta G. & S. C. Mines* [1895] 11 T.L.R. 407.

(28) *Whitehall Court, Ltd.* [1887] 56 L.T. 280.

(29) *Dunston v. Imperial G. L. & W. Coke Co.* [1832] 3 B. & Ad. 125.

**1081. Division of remuneration and time of payment :—**Where the articles provide that there should be allowed to each of the directors out of the company's funds a certain sum per annum as remuneration to be paid at such times as the directors may determine, it is a condition precedent to the right of a director to sue for remuneration (30), or how the remuneration is to be divided (31). No individual director can sue the company for his fees until the directors have made a formal division of the amount available (32).

**1082. Directors cannot get travelling allowances :—**A director is not entitled to any remuneration beyond what has been sanctioned by the articles for doing an act which would be his duty as a director to do (33). Directors are not entitled to get travelling expenses unless the payment is expressly authorized by the articles or by the company in general meeting (34), even though they be entitled to be indemnified against all expenses (35).

**1083. Quantum meruit :—**A director who after vacating his office continues to act as a director, is not entitled to a *quantum meruit* for his services, and if paid, the company can recover the amount (36). The obligation to pay on a *quantum meruit* basis does not however depend on an inference of fact from the conduct of the parties, but on an inference which the law imposes on the parties where the work has been done or goods have been delivered under what purports to be a binding contract but is not so in fact. The law imposes on the party accepting such service or such goods the obligation to pay for them (37).

**1084. Rate of remuneration :—**Remuneration "at the rate of" so much per annum voted at the general meeting accrues from the date of the meeting (38) and can be recovered for broken part of a year (39). But if the terms on which the directors are appointed provide for so much per annum as remuneration, a director is entitled to remuneration only for each complete year of service (40). Articles not being a contract between the company and the directors, an alteration of the articles cannot retrospectively affect the terms as to services already performed (41).

In a voluntary winding up the directors continue as such after the passing of the resolution for winding up (42). So where a full year's service is required to entitle a director to remuneration, service after commencement of the winding up may count to make up the year (43).

**1085. Resolution to forego remuneration :—**If a director take part in a resolution of the board determining that no remuneration is to be paid to the directors for a particular year, he cannot claim any remuneration for that year (44). Such

(30) *Caridad Copper Mining Co. v. Swallow* [1902] 2 K.B. 44.

(31) *Morrel v. Oxford Cement Co.* [1910] 26 T.L.R. 682; *Joseph v. Sonora L. & Timber Co.* [1918] 34 T.L.R. 220.

(32) *Joseph v. Sonoral L. & Timber Co.* [1918] 34 T.L.R. 220.

(33) *Dikshit & Co. v. Mathura Prasad* [1925] 47 All. 94, 22 A.L.J. 883.

(34) *Young v. Naval & Military Society* [1905] 1 K.B. 687.

(35) *Marmor Ltd. v. Alexander* [1908] S.C. 78.

(36) *Bodega Co.* [1904] 1 Ch. 276; *Consolidated Nickel Mines* [1914] 1 Ch. 883.

(37) *Craven-Ellis v. Canons, Ltd.* [1936] 52 T.L.R. 657 (C.A.).

(38) *London Gigantic Wheel Co.* [1908] 24 T.L.R. 618.

(39) *Swabey v. Port Darwin Co.* [1901] 1 Mcg. 386; *Diamond v. English Sewing Cotton Co.* [1922] W.N. 237.

(40) *Salton v. New Beeston Co.* [1899] 1 Ch. 775; *McConnell's Claim* [1901] 1 Ch. 728; *Inman v. Ackroyd & Best, Ltd.* [1901] 1 Q.B. 613; *Shaws, Bryant & Co.* [1901] W.N. 124, 45 S.J. 580.

(41) *Swabey v. Port Darwin Co.* (supra).

(42) See ss. 490 and 491.

(43) *Shaws, Bryant & Co.* (supra).

(44) *McConnell's Claim* (supra).

resolution may however be rescinded by a subsequent resolution and if this is done, remuneration will be payable as from the date of the rescinding resolution (45). Neither uselessness of the director's services, nor that they have diminished, can be successfully pleaded as a bar to the claim.

**1086. Remuneration is not due in the character of member :—**The remuneration is not due to a director in his character of a member of the company and is provable as a debt on winding up in competition with the ordinary creditor (46). Payment to a person for special skill and attention is none the less a provable debt, although the person is a director, or although under the articles a director must be a member (47).

**1087. Set-off :—**Where a company owed to its directors his fees and the directors owed to the company interest on his share calls, the company could not adjust the fees with interest without the directors' consent (48). "By common law there is no right of set off between parties mutually indebted, in the absence of an agreement to that effect. And the rule of equity follows the law, unless there are special circumstances connecting the debts besides the mere fact of mutuality on which the relief can be founded" (49). As to lien see notes to reg. 9, Table A.

**1088. *Cestui que trust* of a director :—**A director's remuneration is not profit derived from his qualification shares. Where he is a trustee for those shares his *cestui que trust* is not entitled to the amount of the remuneration (50).

Directors who in a debenture-holder's action are appointed receivers and managers at a remuneration continue as directors and are nevertheless entitled to their remuneration as directors (51).

**1089. Remuneration at a percentage of 'profits' :—**There is no presumption that the directors' fees are to be paid out of profits (52). The meaning of the word "profits" in an article providing remuneration of the directors by a percentage of profits was discussed in *Frames v. Bultfontein Mines Co.* (53). Where a director, managing director or manager is entitled to be paid a percentage of "profits", it is a question of construction what "profits" means. *Prima facie* it means profits arising from the carrying on the company's business as a going concern and the percentage is not payable on profits made by the sale of the whole undertaking of the company in winding up (54), but is payable on profits in kind earned while the company is a going concern, even though not converted into cash until the winding up (55). As income tax payable by the company is part of its profits (56), the percentage is to be calculated on the profits before deduction of the tax (57).

If a director's remuneration for extra work, e.g., as overseas director, has not been determined by the general meeting, he cannot receive it, although he has performed the duties in accordance with the agreement signed and sealed by the

(45) Consolidated Nickel Mines (supra).

(46) *Ex p. Beckwith* [1898] 1 Ch. 324; *Dover Coalfields Extension Co.* [1908] 1 Ch. 65. But see *Ex p. Cannon* [1885] 30 Ch. D. 629.

(47) *Dale & Plant Ltd.* [1890] 43 Ch. D. 255.

(48) *Punjab Electric Power Co. v. Suraj Kishen* [1936] L. 62.

(49) *Leake on Contracts*, 8th ed., p. 779.

(50) *Dover Coalfields Extension Co.* (supra).

(51) *South-Western of Venezuela Ry. Co.* [1902] 1 Ch. 701.

(52) *Lundy Granite Co.* [1872] 26 L.T. 673.

(53) [1891] 1 Ch. 140.

(54) *Rishton v. Grissell* [1867] 5 Eq. 326; *Frames v. Bultfontein Mining Co.* [1891] 1 Ch. 140.

(55) *Spanish Prospecting Co.* [1911] 1 Ch. 92.

(56) *Ashton Gas Co. v. A. G.* [1906] A.C. 10; [1904] 2 Ch. 621.

(57) *Johnston v. Chestergate Hat Manfg. Co.* [1915] 2 Ch. 338.

directors, but must repay to the company on its counter claim the money paid to him under the agreement (58).

The fact that some of the directors are remunerated as receivers and managers in a debenture-holder's action does not disentitle them to their remuneration in addition as directors from the time when they were appointed receivers and managers until commencement of the winding up (59).

**1090. Balance-sheet no acknowledgment:—**A balance sheet adopted and signed by directors pursuant to s. 133 of the previous Act was not an acknowledgement or written promise by the company or its agents to pay the directors' fees (60).

For other cases relating to the director's remuneration see notes to s. 252.

**310. Provision for increase in remuneration to require Government sanction.**—In the case of a public company, or a private company which is a subsidiary of a public company, an amendment of any provision relating to the remuneration of any director including a managing or whole-time director, which purports to increase or has the effect of increasing, whether directly or indirectly, the amount thereof, whether that provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or by its Board of directors, shall not have any effect unless approved by the Central Government; and the amendment shall become void if, and in so far as, it is disapproved by that Government.

The new sections 310 and 311 introduced by the Joint Committee reproduce ss. 86J (1) (a) (ii) and 86J (1) (d) of the previous Act. "The provisions will be permanent instead of being in force only for three years, as provided in the original Bill. See Schedule XI read with cl. 594 (now s. 599) (*vide* J.C.R., para 107).

In this section alteration has been made by the Lok Sabha by including therein any director including a wholetime director.

**Form :—**For the form of application to Central Government for increasing remuneration of a director, pursuant to this section and s. 311, see Form No. 26 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**311. Increase in remuneration of managing director on re-appointment or appointment after Act to require Government sanction.**—In the case of a public company, or a private company which is a subsidiary of a public company, if the terms of any re-appointment or appointment of a managing or whole-time director, made after the commencement of this Act, purport to increase or have the effect of increasing, whether directly or indirectly, the remuneration which the managing or whole-time director or the previous managing or whole-time director, as

(58) *Kerr v. Marine Products* [1928] 44 T.I.R. 282.

(59) *South-Western of Venezuela Ry. Co.* (*supra*).

(60) *Coliseum (Barrow) Ltd.* [1936] 2 Ch. 44.

the case may be, was receiving immediately before such re-appointment or appointment, the re-appointment or appointment shall not have any effect unless approved by the Central Government; and shall become void if, and in so far as, it is disapproved by that Government.

See notes to the last section.

**Form** :—For the form of application to the Central Government for increasing remuneration of managing director, see notes to the last section.

### *Miscellaneous Provisions*

**312. Prohibition of assignment of office by director.**—Any assignment of his office made after the commencement of this Act by any director of a company shall be void.

This section is based on s. 86B (1) of the previous Act and the recommendation in para 95 of the redraft of s. 86B at page 360 of the C.L.C.R. Assignment of office by a director has been prohibited absolutely—*Notes on Clauses*.

See also s. 204 of the English Act of 1948.

**313. Appointment and term of office of alternate directors.**—

(1) The Board of directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint an alternate director to act for a director (hereinafter in this section called “the original director”) during his absence for a period of not less than three months from the State in which meetings of the Board are ordinarily held.

(2) An alternate director appointed under sub-section (1) shall vacate office if and when the original director returns to the State in which meetings of the Board are ordinarily held.

(3) If the term of office of the original director is determined before he so returns to the State aforesaid, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate, director.

This section is based on s. 86B, provisos and Explanation, of the previous Act and the provisos to s. 86B of the redraft at page 360 of the C.L.C.R. The provisions have been recast in positive terms. The power of appointment of alternate directors vested in directors may not, strictly speaking, be said to constitute an assignment of the office of director—*Notes on Clauses*.

This was originally cl. 289 of the Bill in which alterations have been made by the Joint Committee with the following observation : “Absence from the State in which the meetings of the Board are held, instead of from the district in which such meetings are held, has been made the criterion for the application of the provision contained in this clause” (*vide J.C.R., para 108*).

In the heading of this section after "Appointment" the words "and terms of office" have been added by the Lok Sabha.

**314. Director etc. not to hold office or place of profit.**—(1) Except with the previous consent of the company accorded by a special resolution, no director of a company, no partner or relative of such a director, no firm in which such a director or relative is a partner, no private company of which such a director is a director or member, and no director, managing agent, secretaries and treasurers, or manager of such a private company shall hold any office or place of profit, except that of managing director, managing agent, secretaries and treasurers, manager, legal or technical adviser, banker, or trustee for the holders of debentures of the company,—

(a) under the company; or

(b) under any subsidiary of the company, unless the remuneration received from such subsidiary in respect of such office or place is paid over to the company or its holding company.

(2) If any office or place of profit under the company or a subsidiary thereof is held in contravention of the provisions of sub-section (1), the director concerned shall be deemed to have vacated his office as director with effect from the first day on which the contravention occurs; and shall also be liable to refund to the company any remuneration received, or the monetary equivalent of any perquisites or advantage enjoyed by him, in respect of such office or place of profit.

(3) Any office or place in a company shall be deemed to be an office or place of profit under the company within the meaning of sub-section (1),—

(a) in case the office or place is held by a director, if the director holding it obtains anything by way of remuneration over and above the remuneration to which he is entitled as such director, whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise;

(b) in case the office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it obtains anything by way of remuneration whether as salary, fees, commission,



perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise.

This section is based on s. 86E of the previous Act and para 107 and pages 260 and 261 of the C.L.C.R.—*Notes on Clauses*.

The prohibition contained in s. 86E of the old Act has been extended to a *place of profit*. The consent of the company should now be obtained by a special resolution. What is an office or place of profit has been clarified in sub-s. (2). See para 107 of the C.L.C.R.

In sub-s. (1) of this section the words "or relative" have been added, in sub-s. (3) the words after "vacated his office as" have been inserted and sub-s. (3) has been recast by the Lok Sabha.

### *Restrictions on appointment of managing directors*

**315. Application of sections 316 and 317.**—Sections 316 and 317 shall not apply to a private company, unless it is a subsidiary of a public company.

This section is new. It is based on sub-s. (5) of the redraft of s. 87J at p. 373 of the C.L.C.R. It gives effect to the exception contained in that sub-section—*Notes on Clauses*.

**316. Number of companies of which one person may be appointed managing directors.**—(1) No company shall, after the commencement of this Act, appoint or employ any person as managing director, if he is either the managing director or the manager of any other company, except as provided in sub-section (2).

(2) A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company:

Provided that such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

(3) Where, at the commencement of this Act, any person is holding the office either of managing director or of manager in more than two companies, he shall, within one year from the commencement of this Act, choose not more than two of those companies as companies in which he wishes to continue to hold the office of managing director or manager, as the case may be; and the provisions of clauses (b) and (c) of sub-section (1) and of sub-sections (2) and (3) of section 276 shall apply *mutatis mutandis* in relation to this case, as those provisions apply in relation to the case of a director,

(4) Notwithstanding anything contained in sub-sections (1) to (3), the Central Government may, by order, permit any person to be appointed as a managing director of more than two companies if the Central Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common managing director.

This section is new. It gives effect to the recommendation (ii) in para 146 of the C.L.C.R.—*Notes on Clauses*.

"One of the lacunæ in the Act of 1913 is the absence of any statutory provision relating to the terms and conditions of appointment of managing directors and managers. This lacuna is all the more noticeable, inasmuch as, while the powers and functions of managing directors and managers are in many respects similar to those of managing agents, unlike the latter, the conditions of appointment of the former have not been brought under control and regulation. We suggest that there should be statutory provision for this purpose" (para 146 of the C.L.C.R.).

This was originally cl. 292 of the Bill in which alterations have been made by the Joint Committee with the following observation: "This clause relates to managing directors as well as managers. As this Chapter relates to directors, the Committee have restricted the clause to managing directors. The provision in the original clause, relating to managers, has been made applicable to them by a separate clause in Chapter IV 'B. Managers'—See new clause 386" (*vide* J.C.R., para 109).

Sub-s. (4) has been added by the Lok Sabha..

**317. Managing director not to be appointed for more than five years at a time.**—(1) No company shall, after the commencement of this Act, appoint or employ any individual as its managing director for a term exceeding five years at a time.

(2) Any individual holding at the commencement of this Act the office of managing director in a company shall, unless his term expires earlier, be deemed to have vacated his office immediately on the expiry of five years from the commencement of this Act.

(3) Nothing contained in sub-section (1) shall be deemed to prohibit the re-appointment, re-employment, or the extension of the term of office, of any person by further periods not exceeding five years on each occasion:

Provided that any such re-appointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force.

This section is new. It gives effect to recommendation (iii) in para 146 of the C.L.C.R.—*Notes on Clauses*.

This was originally cl. 293 of the Bill in which alterations were made by the Joint Committee with the following observation: "The provision contained in this

clause applies to managing directors and also to firms and bodies corporate. Clause 316 (now s. 317) has been accordingly confined to managing directors while clause 203 (now s. 204) provides for the application of the provision contained in this clause to firms and bodies corporate" (*vide* J.C.R., para 110). The Lok Sabha has however recast the section.

Original clauses 294 and 295 of the Bill which relate only to managers have been put by the Joint Committee in Chapter IV 'B. Managers'—See the new ss. 384 and 385 (*vide* J.C.R., para 111).

Original clause 296 of the Bill is a general provision applicable not only to directors but also to other officers and has accordingly been placed by the Joint Committee in Chapter I : 'General Provisions' as new section 198 (now s. 199) (*vide* J. C. R., para 112).

Original clauses 297 and 298 of the Bill are also general provisions and have therefore been placed by the Joint Committee in Chapter I as ss. 201 and 202 (now ss. 202 and 203) (*vide* J.C.R., para 113).

Original clause 299 of the Bill which regulates the subject of tax-free payments is a general provision and has accordingly been placed by the Joint Committee in Chapter I as s. 199 (now s. 200) (*vide* J.C.R., para 114).

See notes to s. 2 (26).

### *Compensation for loss of office*

**318. Compensation for loss of office not permissible except to managing or whole-time directors or to directors who are managers.—**

(1) Payment may be made by a company, except in the cases specified in sub-section (3) and subject to the limit specified in sub-section (4), to a managing director, or a director holding the office of manager or in the whole time employment of the company, by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement.

(2) No such payment shall be made by the company to any other director.

(3) No payment shall be made to a managing or other director in pursuance of sub-section (1), in the following cases, namely:—

(a) where the director resigns his office in view of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing director, managing agent, secretaries and treasurers, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

(b) where the director resigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(c) where the office of the director is vacated by virtue of section 203, section 280, or any of the clauses, (a) to (k), of sub-section (1) of section 283;

(d) where the company is being wound up, whether by or subject to the supervision of the Court or voluntarily, provided the winding up was due to the negligence or default of the director;

(e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary or holding company thereof;

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(4) Any payment made to a managing or other director in pursuance of sub-section (1) shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold the office, or where he held the office for a lesser period than three years, during such period:

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before, or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the share-holders the share capital (including the premiums, if any,) contributed by them.

(5) Nothing in this section shall be deemed to prohibit the payment to a managing director, or a director holding the office of manager, of any remuneration for services rendered by him to the company in any other capacity.

This section is new. It is based on s. 191 of the English Act of 1948 and para 89 of the C.L.C.R.—*Notes on Clauses*.

It has been re-cast by the Joint Committee so as to make it self-contained and complete in itself (*vide* J.C.R., para 115).

The heading of this section has been added to by the Lok Sabha by including whole-time directors.

**109DB.** For the purpose of proof in a winding up, the estimation of the value of claims at the commencement should be arrived at by a consideration of the position at that date (61).

**319. Payment to director, etc., for loss of office etc., in connection with transfer of undertaking or property.**—(1) No director of a company shall, in connection with the transfer of the whole or any part of any undertaking or property of the company, receive any payment, by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement—

(a) from such company; or

(b) from the transferee of such undertaking or property or from any other person (not being such company), unless particulars with respect to the payment proposed to be made by such transferee or person (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

(2) Where a director of a company receives payment of any amount in contravention of sub-section (1), the amount shall be deemed to have been received by him in trust for the company.

(3) Sub-sections (1) and (2) shall not affect in any manner the operation of section 318.

This section is new. It is based on s. 192 of the English Act of 1948 and para 89 of the C.L.C.R.—*Notes on Clauses*.

**320. Payment to director for loss of office etc., in connection with transfer of shares.**—(1) No director of a company shall, in connection with the transfer to any persons of all or any of the shares in a company, being a transfer resulting from—

(i) an offer made to the general body of shareholders;

(ii) an offer made by or on behalf of some other body corporate with a view to the company becoming a subsidiary of such body corporate or a subsidiary of its holding company;

(iii) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than one-third of the total voting power at any general meeting of the company; or

(iv) any other offer which is conditional on acceptance to a given extent;  
 receive any payment by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement,—

(a) from such company; or

(b) except as otherwise provided in this section, from the transferees of the shares or from any other person (not being such company).

(2) In the case referred to in clause (b) of sub-section (1), it shall be the duty of the director concerned to take all reasonable steps to secure that particulars with respect to the payment proposed to be made by the transferees or other person (including the amount thereof) are included in, or sent with, any notice of the offer made for their shares which is given to any shareholders.

(3) If—

(a) any such director fails to take reasonable steps as aforesaid; or

(b) any person who has been properly required by any such director to include the said particulars in, or send them with, any such notice as aforesaid fails so to do;  
 he shall be punishable with fine which may extend to two hundred and fifty rupees.

(4) If—

(a) the requirements of sub-section (2) are not complied with in relation to any such payment as is governed by clause (b) of sub-section (1); or

(b) the making of the proposed payment is not, before the transfer of any shares in pursuance of the offer, approved by a meeting, called for the purpose, of the holders of the shares to which the offer relates and other holders of shares of the same class (other than shares already held at the date of the offer by, or by a nominee for, the offerer, or where the offerer is a company, by, or by a nominee for, any subsidiary thereof) as any of the said shares;  
 any sum received by the director on account of the payment shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the offer made, and the expenses incurred by him in distributing that sum amongst those persons shall be borne by him and not retained out of that sum.

(5) If at a meeting called for the purpose of approving any payment as required by clause (b) of sub-section (4), a quorum is not present and, after the meeting has been adjourned to a later date, a quorum is again not present, the payment shall, for the purposes of that sub-section, be deemed to have been approved.

This section is new. It is based on s. 193 of the English Act of 1948 and para 89 of the C.L.C.R.—*Notes on Clauses*.

**321. Provisions supplementary to sections 318, 319 and 320.—**

(1) Where in proceedings for the recovery of any payment as having, by virtue of sub-section (2) of section 319 or sub-section (4) of section 320, been received by any person in trust, it is shown that—

(a) the payment was made in pursuance of any arrangement entered into as part of the agreement for the transfer in question, or within one year before, or within two years after, that agreement or the offer leading thereto; and

(b) the company or any person to whom the transfer was made was privy to that arrangement;  
the payment shall be deemed, except in so far as the contrary is shown, to be one to which that sub-section applies.

(2) If in connection with any such transfer as is mentioned in section 319 or in section 320,—

(a) the price to be paid, to a director of the company whose office is to be abolished or who is to retire from office, for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares; or

(b) any valuable consideration is given to any such director;

the excess or the money value of the consideration, as the case may be, shall for the purposes of that section, be deemed to have been a payment made to him by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement.

(3) References in sections 318, 319, and 320 to payments made to any director of a company by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement, do not include any *bona fide* payment by way of damages for breach of contract or

by way of pension in respect of past services; and for the purposes of this sub-section the expression "pension" includes any superannuation allowance, superannuation gratuity or similar payment.

(4) Nothing in sections 319 and 320 shall be taken to prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments as are therein mentioned or with respect to any other like payments made or to be made to the directors of a company.

This section is new. It is consequential on cls. 300, 301 and 302 (now ss. 318, 319 and 320) and is based on s. 194 of the English Act of 1948—*Notes on Clauses*.

### *Directors with unlimited liability*

#### **322. Directors, etc., with unlimited liability in limited company.—**

(1) In a limited company, the liability of the directors or of any director or of the managing agent, secretaries and treasurers or manager may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of a director, managing agent, secretaries and treasurers or manager is unlimited, the directors, the managing agent, secretaries and treasurers and the manager of the company, and the member who proposes a person for appointment to the office of director, managing agent, secretaries and treasurers or manager, shall add to that proposal a statement that the liability of the person holding that office will be unlimited; and before the person accepts the office or acts therein, notice in writing that his liability will be unlimited, shall be given to him by the following or one of the following persons, namely, the promoters of the company, its directors, its managing agent, secretaries and treasurers or manager, if any, and its officers.

(3) If any director, managing agent, secretaries and treasurers, manager or proposer makes default in adding such a statement, or if any promoter, director, managing agent, secretaries and treasurers, manager or officer of the company makes default in giving such a notice, he shall be punishable with fine which may extend to one thousand rupees and shall also be liable for any damage which the person so appointed may sustain from the default; but the liability of the person appointed shall not be affected by the default.

This section is based on s. 70 of the previous Act and s. 202 of the English Act of 1948. A reference has been made to the managing agent also in the section [*Notes on Clauses*] which has been extended to the Secretaries and Treasurers by the Joint Committee.



**323. Special resolution of limited company making liability of directors etc., unlimited.**—(1) A limited company may, if so authorised by its articles, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director or of its managing agent, secretaries and treasurers or manager.

(2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum:

Provided that no alteration of the memorandum making the liability of any of the officers referred to in sub-section (1) unlimited shall apply to such officer, if he was holding the office from before the date of the alteration, until the expiry of his then term, unless he has accorded his consent to his liability becoming unlimited.

This section is based on s. 71 of the previous Act and s. 203 of the English Act of 1948. The proviso at the end of this section is clearly necessary. Obviously no one can be saddled with unlimited liability against his will—*Notes on Clauses*.

## CHAPTER III

### MANAGING AGENTS

*Prohibition of appointment of managing agent in certain cases.*

**324. Power of Central Government to notify that companies engaged in specified classes of industry or business shall not have managing agents.**—(1) Subject to such rules as may be prescribed in this behalf, the Central Government may, by notification in the Official Gazette, declare that, as from such date as may be specified in the notification, the provisions of sub-section (2) shall apply to all companies, whether incorporated before or after the commencement of this Act, which are engaged on that date or may thereafter be engaged, wholly or in part, in such class or description of industry or business as may be specified in the notification.

(2) Thereupon,—

(a) where any such company has a managing agent on the specified date, the term of office of that managing agent shall, if it does not expire earlier, expire at the end of three years from the specified date, or on the 15th day of August, 1960, whichever is later; and the company shall not re-

appoint or appoint the same or any other managing agent; and

(b) where any such company has no managing agent on the specified date, or where it is incorporated on or after that date, it shall not appoint a managing agent.

(3) Copies of all rules prescribed under sub-section (1) shall, as soon as may be after they have been prescribed, be laid before both Houses of Parliament.

(4) A copy of every notification proposed to be issued under sub-section (1) shall be laid in draft before both Houses of Parliament for a period of not less than thirty days while they are in session; and if, within that period, either House disapproves of the issue of the notification or approves of such issue only with modifications, the notification shall not be issued or, as the case may require, shall be issued only with such modifications as may be agreed on by both the Houses.

The principal changes made by the Joint Committee in regard to managing agents are contained in ss. 324 and 326 introduced by them (*vide* J.C.R., para 118). The Joint Committee observe as follows :—

"S. 323 (now s. 324) gives the Central Government power to notify that all companies engaged whether wholly or in part, in any industry or business specified in the notification shall have no managing agents. The effect of such notification will be as follows :—

(a) No company which did not have a managing agent on the date from which the notification is to take effect can appoint one after that date.

(b) Where a company has a managing agent on that date, the managing agent will cease to hold office with effect from the expiry of a period of three years from the specified date or with effect from the 15th August, 1960, whichever is later.

Where no notification applicable to a company has been issued under s. 323 (now s. 324) and the case does not fall under s. 324 (now s. 325), s. 325 (now s. 326) provides that a managing agent cannot be appointed for the company without the specific approval of the Central Government. The Central Government cannot accord such approval unless it is satisfied in regard to three matters, namely,—

(a) that it is not against the public interest to allow the company in question to have a managing agent ;

(b) that the managing agent proposed is a fit and proper person, and that the conditions of the managing agency agreement proposed are fair and reasonable ; and

(c) that any condition which the Central Government requires the managing agent to fulfil have been fulfilled" (*vide* J.C.R., para 118).

For sub-s. (3) of this section the Rajya Sabha has substituted the new sub-ss. (3) and (4) providing further safe-guards.

**1092. Section not retrospective :—**With respect to agency agreement, the amendment Act XXII of 1936 was not retrospective except that a managing agency existing when that Act came into force could only survive for twenty years from that date (62).

**1093. Appointment of managing agent :—**A provision in the memorandum of association of a company relating to the appointment of a managing agent is merely a detail of management for the purpose of carrying on the business of the company which is entitled to regulate that detail in such manner as it likes without going to the Court for sanction. The fact that the provision relating to the appointment of managing agent is inserted among the objects of the company makes no difference (63). See s. 13 and notes thereto.

**1094.** Where the contract was that the firm of M. F. & Co. for the time being should be the agents of the company for 25 years, the right to sue on the contract survived to their legal representatives after the death of M. F. (64).

**1094A. Committee of inquiry Rule :—**For the purpose of making an inquiry into the desirability of applying the provisions of sub-s. (2) to companies engaged in any class or description of industry or business, the Central Government may, by notification in the Official Gazette, appoint a Committee of Inquiry. As to the composition, power etc. of the Committee of Inquiry and other details, see Rule 11 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**325. Managing agency company not to have managing agent.—**

(1) No company acting as the managing agent of any other company shall, after the commencement of this Act, appoint a managing agent for itself, whether it transacts any other kind of business in addition or not.

(2) No company having a managing agent shall, after the commencement of this Act, be appointed as the managing agent of any other company.

(3) Any appointment of managing agent made in contravention of sub-section (1) or (2) shall be void.

(4) Where at the commencement of this Act a company having a managing agent is itself acting as a managing agent of any other company, the term of office of the company first mentioned as managing agent of the other company shall, if it does not expire earlier in accordance with the provisions applicable thereto immediately before such commencement [including any provisions contained in the Indian Companies Act, 1913 (VII of 1913)], expire on the 15th day of August, 1956.

The original cl. 307 of the Bill provided that a private company acting as managing agent is not to have a managing agent. This section inserted by the Joint Committee has made the provision general.

Sub-s. (4) has been added to this section by the Lok Sabha.

(63) *Ramchandra v. Chunibhai* [1944] B. 76, 45 Bom. L.R. 1075.

(64) *Nasserwanjee v. Gordon* [1881] 6 Bom. 266.

*Appointment and term of office*

**326. Central Government to approve of appointment, etc., of managing agent; and circumstances in which approval may be accorded.**—(1) In respect of any company to which neither the prohibition specified in section 324 nor that specified in section 325 applies, a managing agent shall not be appointed or re-appointed,—

(a) except by the company in general meeting; and

(b) unless the approval of the Central Government has been obtained for such appointment or re-appointment.

(2) The Central Government shall not accord its approval under sub-section (1) in any case, unless it is satisfied—

(a) that it is not against the public interest to allow the company to have a managing agent;

(b) that the managing agent proposed is, in its opinion, a fit and proper person to be appointed or re-appointed as such, and that the conditions of the managing agency agreement proposed are fair and reasonable; and

(c) that the managing agent proposed has fulfilled any conditions which the Central Government requires him to fulfil.

This section is new. It has been inserted by the Joint Committee. See notes to S. 324.

*Vide* s. 87CC of the previous Act.

**Form** :—For the form of application to the Central Government for appointment etc. of managing agent, pursuant to this section, see Form No. 25 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**327. Application of sections 328 to 331.**—The provisions of sections 328 to 331 shall apply to—

(a) a public company;

(b) a private company which is a subsidiary of a public company; and

(c) a private company which is not a subsidiary of a public company, unless the Central Government, by general or special order, specifically exempts the private company.

This section is new. It is prefatory to ss. 327 (now s. 328) and 330 (now s. 331). It indicates the extent of application of those sections—*Notes on Clauses*.

See sub-s. (5) of s. 87A of the previous Act.

Cl. (c) has been added by the Lok Sabha.

**328. Term of office of managing agent.**—(1) After the commencement of this Act, no company shall—

(a) in case it appoints a managing agent for the first time (that is to say, in case the company has had no managing agent at any time since its formation), make the appointment for a term exceeding fifteen years;

(b) in any other case, re-appoint or appoint a managing agent for a term exceeding ten years at a time;

(c) re-appoint a managing agent for a fresh term, when the existing term of the managing agent has two years or more to run:

Provided that the Central Government may, if satisfied that it is in the interest of the company so to do, permit the re-appointment of a managing agent at an earlier time than that specified in clause (c).

(2) For the purpose of sub-section (1), re-appointment does not include the re-appointment of any person on fresh, additional or changed conditions for any period not extending beyond his existing term, but otherwise includes—

(a) the renewal, or the extension of the term, of a previous appointment; and

(b) the appointment of any person or persons having an interest in the previous managing agency.

(3) Any appointment or re-appointment of a managing agent, made in contravention of the provisions of sub-sections (1) and (2) shall be void in respect of the entire term for which the appointment or re-appointment is made.

This section corresponds to s. 87A of the previous Act. It is based on para 117 of the C. L. C. R. and recommendations (i) and (ii) at page 267 of their Report. The proviso gives power to the Central Government to relax the requirements of sub-s. (1) in suitable cases, that is, wherever it may be really necessary to do so—*Notes on Clauses.*

This was originally cl. 309 of the Bill in which alteration has been made by the Joint Committee with the following observation: "New sub-clause (3) added by the Committee makes it clear that an appointment of a managing agent which purports to be made for more than the maximum permissible period will be void for the entire period, and not merely in respect so much thereof as may be in excess of the maximum period permissible" (*vide* J.C.R., para 119).

### *Variation of Managing Agency Agreement*

**329. Variation of managing agency agreement.**—A resolution of the company in general meeting shall be required for varying the terms of a managing agency agreement; and before such a

resolution is passed, the previous sanction of the Central Government shall be obtained therefor.

The original cl. 310 of the Bill provided for the appointment of a managing agent by the company in general meeting and for variation of the terms of an agreement with the managing agent by a special resolution. All this has been altered by the Joint Committee.

*Special provisions regarding existing managing agents*

**330. Term of office of existing managing agents to terminate on 15th August, 1960.**—Where a company has a managing agent at the commencement of this Act, the term of office of such managing agent shall, if it does not expire earlier in accordance with the provisions applicable thereto immediately before such commencement [including any provisions contained in the Indian Companies Act, 1913 (VII of 1913)], expire on the 15th day of August, 1960, unless before that date he is re-appointed for a fresh term in accordance with any provision contained in this Act.

This was originally cl. 311 of the Bill which has been altered by the Joint Committee with the following observation : "All existing managing agents will cease to hold office on the 15th August, 1960, that is to say, on the expiry of about five years from the coming into force of this Bill. Where however a managing agent is re-appointed before that date under this new law, which will be possible only if the Central Government approves of such re-appointment, this clause will not apply" (*vide* J.C.R., para 120).

**331. Application of Act to existing managing agents.**—All provisions of this Act, other than those relating to the term for which the office can be held, shall apply to every managing agent holding office at the commencement of this Act, with effect from such commencement.

This was originally cl. 312 of the Bill which has been altered by the Joint Committee with the following observation : "The Committee do not consider it necessary to postpone the application of the provisions contained in the Bill by two years, as was proposed in the Bill as introduced. They have accordingly omitted sub-clause (2). To prevent any inconvenience which may arise from the Bill coming into operation in the middle of the financial year of a company, the Committee have provided for this clause being given effect to, in such cases, from the end of that financial year. The omission of sub-clause (2) of original clause 312 has entailed the omission of original clauses 313 and 314" (*vide* J. C. R., para 121).

The Proviso to the original section has been omitted by the Lok Sabha

*Restrictions on Number of Managing Agencies*

**332. No person to be managing agent of more than ten companies after 15th August, 1960.**—(1) After the 15th day of August, 1960, no person shall, at the same time, hold office as managing agent in more than ten companies.

(2) Where a person holding office as managing agent in more than ten companies before that date fails to comply with sub-section (1), the Central Government may permit him to hold office as managing agent with effect from that date in respect of such of those companies, not exceeding ten in number, as it may determine.

(3) In calculating the number of companies of which a person may be a managing agent in pursuance of this section, the following companies shall be excluded, namely:—

(a) a private company which is neither a subsidiary nor a holding company of a public company;

(b) an unlimited company;

(c) an association which does not carry on business for profit, or which prohibits the payment of a dividend.

(4) For the purposes of this section, each of the following persons shall also be deemed to hold office as managing agent of the company:—

(a) where a managing agent of the company is a firm, every partner in the firm;

(b) where the managing agent of the company is itself a company, every person who is a director, the secretaries and treasurers or a manager, of the latter company, and every member thereof who is entitled to exercise not less than twenty per cent. of the total voting power therein.

(5) Any person who acts as a managing agent of more than ten companies in contravention of this section shall be punishable with fine which may extend to one thousand rupees in respect of each of those companies in excess of ten, for each day on which he so acts.

This section is new. It has been introduced by the Joint Committee with the following observation: "The Committee consider that no person should be managing agent of more than ten companies after the 15th August, 1960, when all existing managing agencies will except where they have been renewed with the consent of Government come to an end. In order to prevent evasion of this requirement, persons closely associated with the managing agent of a company will be treated as the managing agent of that company for the purposes of reckoning the number ten. The following persons will accordingly be treated as managing agents of a company, namely (a) every member of the firm acting as the managing agent or as secretaries and treasurers, and (b) where a body corporate acts as the managing agent, every director, manager, or member of the firm acting as managing agent or secretaries and treasurers, of that body corporate.

"The following companies will not be taken into account in calculating the number of companies which may be managed by one person, namely:—

(a) a private company which is neither a subsidiary nor a holding company of a public company;

(b) an unlimited company ;

(c) an association which does not carry on business for profits or which prohibits the payment of a dividend.

"A heavy penalty, *viz.*, a fine of one thousand rupees for each day on which, and in respect of each company for which, a person acts as managing agent of more than ten companies, has been provided. Where a person continues to manage more than ten companies in contravention of this provision, the Government will have power to choose *not more than* ten companies in which alone such person should function as managing agent" (*vide* J.C.R., para 122).

### *Right to charge on assets*

#### **333. Right of managing agent to charge on company's assets.—**

A managing agent whose office stands terminated under section 324 or 332 shall be entitled to a charge on the assets of the company in respect of all moneys which are due to him from the company at the date of such termination, or which he may have to pay after that date in respect of any liability or obligation properly incurred by him on behalf of the company before such date, subject to all existing charges and incumbrances, if any, on such assets.

This section also is new. It has been inserted by the Joint Committee with the following observation : "This clause merely reproduces the effect of the original clause 311 (2) in a clearer and simpler form. A managing agent whose office will stand terminated as a result of new clause 323 (now s. 324) or new clause 331 (now s. 332) will be entitled to a charge on the assets of the company, in respect of all sums, which are or may become due to the managing agent from the company" (*vide* J.C.R., para 123).

This section corresponds to sub-s. (3) of 87A of the previous Act

### *Vacation of Office, Removal and Resignation*

**334. Vacation of office on insolvency, dissolution or winding up, etc. —**Subject to the provisions of section 340, the managing agent of a company shall be deemed to have vacated his office as such—

(a) in case the managing agent is an individual, if he is adjudged an insolvent;

(b) in the same case, if the managing agent applies to be adjudicated an insolvent;

(c) in case the managing agent is a firm, on its dissolution from any cause whatsoever, including the insolvency of a partner in the firm;

(d) in case the managing agent is a body corporate, on the commencement of its winding up whether by or subject to the supervision of the Court, or voluntarily;



(e) in all cases, on the commencement of the winding up of the company managed by the managing agent, whether by or subject to the supervision of the Court or voluntarily.

SS. 333 to 338 (now ss. 334 to 339) are intended, broadly speaking, to give effect to the recommendations in paras 119 to 122 of the C.L.C.R. These have been summarised at pages 271 to 277 of the Report—*Notes on Clauses*.

S. 334 provides for the vacation of office by the managing agent where he is adjudicated insolvent or on the dissolution of the managing agency firm or winding up of the managing agency corporation—*ibid*. See cl. (b) of s. 87B of the previous Act.

**335. Suspension from office where receiver appointed.**—(1) The managing agent of a company shall be deemed to have been suspended from his office as such, if a receiver is appointed for his property—

(a) by a Court, or

(b) by or on behalf of the creditors of the managing agent, including the holders of debentures issued by the managing agent, in pursuance of any power conferred by an instrument executed by the managing agent:

Provided that the Court which appointed the receiver, or which will have jurisdiction to wind up the managed company, as the case may be, may, by order, direct that the managing agent shall continue to act as such for such period and subject to such restrictions and conditions, if any, as may be specified in the order.

(2) The Court may, at any time, cancel or vary any order passed by it under the proviso to sub-section (1).

This section is new. It provides for the suspension of the managing agent from office, when a receiver is appointed for his property either by the Court or by his creditors in pursuance of any powers conferred on them by an instrument. Power has been given to the Court which appoints a receiver or which will have jurisdiction to wind up the company, to continue the managing agent in office and to cancel or vary any such order from time to time—*Notes on Clauses*.

**336. Vacation of office on conviction in certain cases.**—Subject to the provisions of sections 340 and 341, the managing agent of a company shall also be deemed to have vacated his office as such, if—

(a) the managing agent;

(b) in case the managing agent is a firm, any partner in the firm; or

(c) in case the managing agent is a body corporate, any director of, or any officer holding a general power of attorney from, such body corporate;

is convicted by a Court in India, after the commencement of this Act, of any offence, and sentenced therefor to imprisonment for a period of not less than six months.

This section is based on recommendation (i) in para 119 of the C.L.C.R. and cl. (a) of s. 87B of the old Act the case law under which is given below.

This was originally cl. 317 of the Bill in which alteration has been made by the Joint Committee with the following observation : "The distinction between bailable and non-bailable offences has been removed and a sentence of imprisonment for a period of not less than six months will attract the disqualification imposed by this clause" (*vide* J.C.R., para 124).

**1095. Removal of managing agent** :—As in the case of a master and servant, so in the case of a company and its managing agents, in each case of misconduct justifying the termination of the employment, the question is whether the misconduct proved or reasonably apprehended has such a direct bearing on the employer's business as to seriously affect or threaten seriously to affect the employer's business or the employee's efficient discharge of his duty to his employer (65). In the last cited case quarrels between partners of the firm of managing agents were held sufficient to justify termination of their employment.

Under ss. 21 and 57 of the Specific Relief Act I of 1877, a limited company cannot be restrained by injunction from dispensing with the service of the managing agents, even when the contract of service provides that they are only to be removed in a specified manner and after a specified period. Nor can the shareholders be restrained by injunction from considering the question of such removal at an extraordinary general meeting of the company. The remedy of the managing agents for dismissal, if wrongful, lies in a suit for damages (66).

S. 87B of the old Act was directed solely to securing that a managing agent should not be validly appointed, removed or have his contract altered without a resolution of the company. It did not empower a company to remove its managing agent by an ordinary resolution at a general meeting where the articles prescribed that they were removable only by an extraordinary resolution passed at an extraordinary general meeting specially convened for the purpose. Where a company removed its managing agents by ordinary resolution of a general meeting contrary to its articles of association, and the Court affirmed the continuance in force of the managing agents' appointment, the decree merely prevented dismissal of the managing agents or termination of their appointment at the instance of a majority in violation of the articles which the minority were entitled to observe. As between the company and the managing agents it had not the effect of enforcing a contract of personal service. In such a case the question was much more than one merely concerning the internal management of the company, and a suit for declaring the resolution as invalid was not barred (67). In view of s. 87B of the old Act the termination of the office of the managing agent was not a valid termination (68).

**337. Removal for fraud or breach of trust.**—A company in general meeting may, by ordinary resolution, remove its managing agent from office—

(65) *Morarji Gokuldas & Co. v. Sholapur Spinning & Weaving Co.* [1944] P.C. 17, 48 C.W.N. 181 (P.C.), [1944] A.L.J. 93.

(66) *N. C. Sircar & Sons v. Baraboni Coal Co.* [1911] 16 C.W.N. 289; see *Gulab Singh v. Punjab Zemindara Bank* [1940] L. 243, 190 I.C. 819.

(67) *Ram Kissendas v. Satya Charan* [1950] P.C. 81 affirming the same case in 50 C.W.N. 310 on this point.

(68) *Associated Industrial Engineers v. Jaffar Sahib* [1953] M. 197, [1952] 2 M.L.J. 376.

(i) for fraud or breach of trust in relation to the affairs of the company or of any subsidiary or holding company thereof, whether committed before or after the commencement of this Act;

(ii) for fraud or breach of trust, whether committed before or after such commencement, in relation to the affairs of any other body corporate, if a Court of Law, whether in or outside India, finds such fraud or breach of trust to have been duly established; or

(iii) subject to the provisions of sections 340 and 341, where the managing agent is a firm or body corporate, if any partner in the firm, or any director of, or any officer holding a general power of attorney from, the body corporate is guilty of any such fraud or breach of trust as is referred to in clause (i).

This section is new and is based on recommendation (ii) in para 119 of the C. L. C. R. It has been made clear that any fraud or breach of trust of which a managing agent has been convicted outside India may also be taken into account by the company. The proviso prohibits the company which has appointed a managing agent with clear knowledge of his previous conviction from removing him afterwards on that ground—*Notes on Clauses*.

This was originally cl. 318 of the Bill which has been altered by the Joint Committee with the following observation: "The Committee have omitted the proviso which made the clause inapplicable where the company was aware of the fraud or breach of trust of which the managing agent was guilty. The Committee are of opinion that the grant of an exemption couched in these terms would lead to difficulties in practice. The Committee have however made the clause applicable to cases where a partner of a managing agency firm, or a director of a body corporate acting as managing agent, has been guilty of fraud or breach of trust such as is referred to in this clause" (*vide* J.C.R. para 125).

See notes to the last section and see also cl. (f) of s. 87B of the old Act under which it has been held as follows:—

1096. Cl. (f) of s. 87B of the previous Act did not empower a company to dismiss its managing agents by an ordinary resolution at a general meeting passed by a bare majority, where by the articles of association they were removable only (1) by an extraordinary resolution, (2) at an extraordinary general meeting, and (3) at which three-fourths of the share capital were represented (69). S. 54 of the Specific Relief Act read with s. 56 (f) thereof does not prevent an injunction at the suit of some shareholders restraining the company from acting contrary to the articles of association although the action complained of is connected with a contract of service (69).

If a statute creates an obligation and provides in the same section or passage a specific means or procedure for enforcing it, no other method than that thus provided can be used for that purpose (70).

(69) *Ramkissendas v. Satya Charan* [1946] 50 C.W.N. 310.

(70) *Ibid*—per Gentle J.

**338. Removal for gross negligence or mismanagement.**—A company in general meeting may, by special resolution, remove its managing agent from office for gross negligence in, or for gross mismanagement of, the affairs of the company or of any subsidiary thereof.

This section is new and is based on recommendation (iii) of para 119 of the C. L. C. R.—*Notes on Clauses.*

See notes to ss. 336 and s. 337.

**339. Power to call meetings for the purposes of sections 337 and 338 and procedure.**—(1) Without prejudice to any other provision contained in this Act or in the articles of the company for the calling of meetings, any two directors of the company may call a general meeting of the company for the purpose of considering any resolution of the nature referred to in section 337 or 338.

(2) On receipt of notice of any such resolution, a copy of the resolution shall be sent forthwith to the managing agent by the company.

(3) The managing agent shall have, in relation to any such resolution, all the rights which a director of the company has under section 284 in relation to any resolution for removing him from office, including, in particular, the right to make representations to the company in writing, to have such representations sent to members of the company and to have them read out at the meeting and also the right to be heard on the resolution at the meeting.

This section is new and is based on the last portion of recommendation (i) of para 119 of the C. L. C. R. The managing agent has been given the same rights as a director in the matter of making written and oral representations in respect of resolutions providing for his removal—*Notes on Clauses.*

See notes to s. 336.

**340. Time when certain disqualifications will take effect.**—

(1) The disqualifications imposed by clause (a) of section 334, by sub-section (1) of section 335, by section 336, and by any resolution passed in pursuance of clause (ii) of section 337, shall not take effect—

(a) for thirty days from the date of the order of adjudication, appointment of the receiver, sentence, or finding of the Court as the case may be, or

(b) where any appeal or petition is preferred within the thirty days aforesaid against the order, appointment,

sentence or conviction resulting in the sentence, or finding, until the expiry of seven days from the date on which such appeal or petition is disposed of, or

(c) where within the seven days aforesaid, any further appeal or petition is preferred in respect of the order, appointment, sentence, conviction or finding, as the case may be, and the appeal or petition, if allowed, would result in the removal of the disqualification, or in making the resolution inapplicable, as the case may be, until such further appeal or petition is disposed of.

(2) In the cases referred to in sub-section (1), the Board may suspend the managing agent from office immediately on, or at any time after, the adjudication, appointment, sentence or finding referred to in clause (a) of that sub-section and until the disposal of the appeals and petitions, if any, referred to in clauses (b) and (c) thereof, or until the convicted partner, director or officer is expelled or dismissed in pursuance of section 341, as the case may be.

This section is new and is based on the second para of recommendation (i) of para 119 of the C. L. C. R. Provision has also been made for a case where there is a further appeal or revision petition against the sentence—*Notes on Clauses*.

**341. Conviction not to operate as disqualification if convicted partner, director, etc., is expelled.**—(1) In the cases referred to in clauses (b) and (c) of section 336, it shall be open to the managing agent, notwithstanding anything to the contrary in any other law or agreement, for the time being in force, to expel or dismiss the convicted partner, director or officer, within thirty days from the date of his sentence; and in that event, the disqualifications imposed by the clauses aforesaid shall cease to apply.

(2) Sub-section (1) shall not affect the operation of section 346 in any case to which that section would otherwise apply.

This section is based on the latter portion of the first sub-para of recommendation (i) of para 119 C.L.C.R.—*Notes on Clauses*. See also the Proviso to cl. (a) of s. 87B of the previous Act.

This was originally cl. 322 of the Bill in which alteration has been made by the Joint Committee with the following observation: "The Committee have made it clear that the provisions of sub clause (1) will over-ride any provision to the contrary contained in any other law or agreement. In other words, it will be open to the managing agent to expel or dismiss a convicted director, partner or officer, although the agreement entered into with him does not provide for a right to effect such removal" (*vide* J. C. R., para 126).

**342. Resignation of office by managing agent.**—(1) Unless the managing agency agreement otherwise provides, a managing agent may, by notice to the Board, resign his office with effect from such date as may be specified in the notice.

(2) The managing agent shall cease to act as such with effect from the date so specified or from such later date, if any, as may be mutually agreed on between him and the Board; but his resignation shall not be effective until it is considered as provided in sub-section (3).

(3) When notice of resignation is given as aforesaid, the Board shall—

(a) prepare a statement of the affairs of the company as at the date specified in the notice of resignation or such subsequent date [not being later than that on which the managing agent ceases to act as such under sub-section (2)] as the directors may think suitable, together with a balance sheet made out as at that date, and a profit and loss account for the period subsequent to the date for which the last such account was prepared and laid before the company in general meeting, and ending on that date;

(b) obtain a report from the auditors of the company on such balance sheet and profit and loss account, in accordance with sections 227, 228 and 229; and

(c) place the managing agent's resignation together with the statement of affairs, balance sheet, profit and loss account and auditors' report mentioned above, before the company in general meeting.

(4) In relation to any report made by the auditors as aforesaid, sections 230, 231, 232 and 233 shall apply in like manner as they apply in relation to the auditors' report referred to therein.

(5) The company in general meeting may, by resolution, accept the resignation or take such other action with reference thereto as it may deem fit.

This section is new. It is based on para 121 of the C. I. C. R.

### *Transfers of, and Succession to, Office*

**343. Transfer of office by managing agent.**—A transfer of his office by the managing agent of a company shall not take effect

unless it is approved both by the company in general meeting and by the Central Government.

This section is based on cl. (c) of s. 87B of the previous Act the notes under which are given below:—

**1097. Transfer of Office :—**As a general rule, a party to a contract cannot assign his liability thereunder without the other party's consent. Under this section too, the office of managing agent cannot be transferred without the consent of the company. The Act does nothing more than give statutory recognition to the general law (71). A transfer by the managing agent of a company of his office amounts to a transfer of his liability under a contract and would be void against the whole world without the company's consent (71). This clause applies to the case of transfer of office of a managing agent to himself and certain other persons (71).

**1098.** A firm was appointed secretaries, treasurers and agents of a company by an agreement and subsequently all the original partners ceased to exist and to function as secretaries &c., and thereupon the company made its own arrangement. In a suit by an assignee of an assignee of some of the original partners of the firm it was held that as neither the plaintiff nor any of his predecessors had compelled the company, as they could under the aforesaid agreement, to enter into a fresh agreement with them, the company was not bound to employ the plaintiff, and without setting up a novation or an estoppel the plaintiff could not sue for damages for breach of the agreement to which he was not a party (72); and there was no privity of contract between the company and the firm when all the original partners had ceased to exist as such (73). The definition of "original partners" given in the proviso says that it is only for the purpose of the proviso (73). The fact that under the Indian Partnership Act 1932 a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession (73).

**344. Managing agency not to be heritable after commencement of Act.**—Any agreement made by a company other than a private company which is not a subsidiary of a public company, with its managing agent after the commencement of this Act shall be void in so far as it provides for succession to the office by inheritance or devise.

This section is new. It has been introduced by the Joint Committee with the following observation: "Many of the admitted evils of the managing agency system result from the managing agency being heritable. In future, no managing agency agreement can provide for the managing agency being heritable or devisable by will. Such an agreement will be void" (*vide* J. C. R., para 127).

**345. Succession to managing agency by inheritance or devise under agreement before commencement of Act, to be subject to Central Government's approval.**—(1) Where the office of the managing agent of a company is held by an individual at the commencement

(71) *Ramchandra v. Chinubhai* [1944] B. 76, 45 Bom. L.R. 1075.

(72) *Bhagwanji v. Alembic Chemical Works* [1944] B. 205, 46 Bom. L.R. 265; on appeal to the Privy Council [1948] 52 C.W.N. 681 (P.C.).

(73) [1848] 52 C.W.N. 681 (P.C.), *supra*.

of this Act and the managing agency agreement provides for succession to the office by inheritance or devise, no person shall succeed to the office on the death of the holder thereof, unless the succession of such person thereto is approved by the Central Government; and that Government shall not accord such approval unless, in its opinion, such person is a fit and proper person to hold the office of managing agent of the company.

(2) The provisions of sub-section (1) shall not apply to a private company which is not a subsidiary of a public company.

This section also is new. It has been inserted by the Joint Committee with the following observation : "Where however such an agreement has been already entered into, that is, before the coming into force of the new Bill, the heir or devisee of the managing agent will be entitled to act as managing agent, if, and only if, the Government are satisfied that the heir or devisee is a fit and proper person to manage the affairs of the company. The Committee attach much importance to this provision, as they consider that it will prevent a great evil to which the existing law has given rise" (*vide* J. C. R., para 128).

### *Changes in Constitution of Firms and Corporations*

**346. Changes in constitution of managing agency firm or corporation to be approved by Central Government.**—(1) Notwithstanding anything to the contrary contained in any other provision of this Act, where the managing agent of a public company, or of a private company which is a subsidiary of a public company, is a firm or body corporate and any change takes place in the constitution of the firm or body corporate, the managing agent shall cease to act as such on the expiry of six months from the date on which the change takes place or such further time as the Central Government may (whether before or after the expiry of the six months) allow in that behalf, unless the approval of the Central Government has been accorded before such expiry to the changed constitution of the firm or body corporate.

*Explanation.*—For the purposes aforesaid, a change in the constitution of a body corporate means—

(a) its conversion from a private to a public company, or from a public to a private company;

(b) any change among the directors or managers of the corporation, whether caused by the death or retirement of a director or manager, the appointment of a new director or manager, or otherwise;

(c) any change in the ownership of shares in the body corporate or in the case of a body corporate not having a share capital, any change in its membership.



(2) Where a managing agent is a body corporate (other than a private company) the shares whereof are for the time being dealt in, or quoted on, a recognised stock exchange, no change in the ownership of the shares of the company shall be deemed to be a change in its constitution within the meaning and for the purposes of sub-section (1), unless the Central Government, by notification in the Official Gazette, otherwise directs:

Provided that no such notification shall be issued in respect of any company, unless the Central Government is of opinion that any change in the ownership of its shares has taken place or is likely to take place, which has affected or is likely to affect prejudicially the affairs of any company which is being managed by the managing agent.

This section is new and is based on para 122 of the C. L. C. R. Where there is a change in the constitution of the managing agency firms or body corporate to the extent of one half of the total interest, a provision like this is clearly desirable—*Notes on Clauses.*

This was originally cls. 325 and 326 of the Bill which have been altered by the Joint Committee with the following observation: "Most of the managing agencies are held by firms or bodies corporate. The principle adopted by the Committee in regard to changes in the constitution of the managing agency firm or corporation is that any change which may take place should be approved within six months of the occurrence thereof by the Government and that if such approval is not accorded, the firm or body corporate should cease to be managing agent" (*vide* J. C. R., para 129).

See s. 87BB of the previous Act introduced by Act 52 of 1951.

Cl. 327 of the original Bill has been omitted by the Joint Committee.

**Forms** :—For the form of application to the Central Government for approval of change of constitution of (1) a firm and (2) a body corporate acting as managing agent, in pursuance of this section, see Forms Nos. 27 and 28 respectively, in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

### **347. Application of Schedule VIII to certain managing agents.—**

(1) The provisions of Schedule VIII shall apply—

(a) to every firm or private company which acts as the managing agent of any company, whether public or private; and

(b) save as provided in sub-section (2), to every other body corporate (not being a private company) which acts as the managing agent of any company, whether public or private.

(2) A body corporate (not being a private company) acting as managing agent shall, if and so long as its shares are dealt in, or quoted on, any recognised stock exchange, be exempt from

the operation of sub-section (1), unless the Central Government, by notification in the Official Gazette, otherwise directs:

Provided that the Central Government may, by order, modify or limit the operation of this sub-section in relation to any body corporate in such manner as that Government thinks fit.

(3) If default is made by a managing agent to which Schedule VIII applies in complying with the provisions thereof,—

(a) if the managing agent is a firm, every partner therein who is in default, and

(b) if the managing agent is a body corporate, the body corporate, and every director or other officer thereof who is in default,

shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

This section is new. It provides for the application of Schedule VIII to managing agents. The Schedule implements the recommendations (i), (ii) and (iii) in para 122 of the C. L. C. R.—*Notes on Clauses*.

Schedule VIII provides for declarations to be made by firms, private companies and public companies, acting as managing agents. See this Schedule.

### *Remuneration of managing agents*

**348. Remuneration of managing agent ordinarily not to exceed 10 per cent. of net profits.**—Save as otherwise expressly provided in this Act, a company shall not pay to its managing agent, in respect of any financial year beginning at or after the commencement of this Act, by way of remuneration, whether in respect of his services as managing agent or in any other capacity, any sum in excess of ten per cent. of the net profits of the company for that financial year.

SS. 348 to 364 deal with the subject of remuneration payable to managing agents and are intended to carry out the recommendations contained in paras 125 to 133 of the C. L. C. R.—*Notes on Clauses*.

S. 348 is based on the recommendation in para 126 of the C. L. C. R. and also on sub-s. (i) of the redraft of s. 87C at page 364 of the Report—*Notes on Clauses*. In the last line of this section for "annual" the words "for that financial year" have been substituted by the Lok Sabha.

**1098A. Extra remuneration :—**Where by a resolution passed on 15-11-1937 by the Board the company replaced the deceased managing agent by a new one as his legal representative in virtue of his own right as contemplated in the memorandum and articles, it could not be said that the appointment was made after the commencement of the amendment Act of 1936. Hence, no special resolution as

required by s. 87C of the old Act for payment of extra remuneration to the managing agent was necessary (73a).

For other cases see notes to the next section.

**349. Determination of net profits.**—(1) In computing for the purpose of section 348, the net profits of a company in any financial year—

(a) credit shall be given for the sums specified in sub-section (2), and credit shall not be given for those specified in sub-section (3); and

(b) the sums specified in sub-section (4) shall be deducted, and those specified in sub-section (5) shall not be deducted.

(2) In making the computation aforesaid, credit shall be given for the following sums:—

Bounties and subsidies received from any Government, or any public authority constituted or authorised in this behalf by any Government, unless and except in so far as the Central Government otherwise directs.

(3) In making the computation aforesaid, credit shall not be given for the following sums:—

(a) profits, by way of premium, on shares or debentures of the company, which are issued or sold by the company;

(b) profits on sales by the company of forfeited shares;

(c) profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof;

(d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets.

(4) In making the computation aforesaid, the following sums shall be deducted:—

(a) all the usual working charges;

(b) directors' remuneration;

(c) bonus or commission paid or payable to any member of the company's staff, or to any engineer, technician or person employed or engaged by the company, whether on a whole-time or on a part-time basis;

(d) any tax notified by the Central Government as being in the nature of a tax on excess or abnormal profits;

(e) any tax on business profits imposed for special reasons or in special circumstances and notified by the Central Government in this behalf;

(f) interest on debentures issued by the company;

(g) interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets;

(h) interest on unsecured loans and advances;

(i) expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature;

(j) outgoing;

(k) depreciation to the extent specified in section 350;

(l) the loss (not including any loss of a capital nature) incurred in any year which begins at or after the commencement of this Act, in so far as it has not been taken into account in arriving at the net profits of that year or of any subsequent year preceding the year in respect of which the net profits have to be ascertained;

(m) any compensation or damages to be paid in virtue of any legal liability, including a liability arising from a breach of contract;

(n) any sum paid by way of insurance against the risk of meeting any liability such as is referred to in clause (m).

(5) In making the computation aforesaid, the following sums shall not be deducted:—

(a) the remuneration payable to the managing agent;

(b) income-tax and super-tax payable by the company under the Indian Income-tax Act, 1922 (XI of 1922), or any other tax on the income of the company not falling under clauses (d) and (e) of sub-section (4).

(c) any compensation, damages or payments made voluntarily, that is to say, otherwise than in virtue of a liability such as is referred to in clause (m) of sub-section (4).

This section is new. It is based on para 130 of the C. L. C. R. and sub-s. (2) of the redraft of s. 87C at pages 364 and 365 of the Report—*Notes on Clauses*.

This was originally cl 330 of the Bill, in which alterations have been made by the Joint Committee with the following observation: "Only slight amendments of

a clarificatory nature have been made in this clause by the Committee" (*vide* J. C. R., para 130).

The Lok Sabha has made alterations in the first two lines of this section.

Cases decided under s. 87C of the old Act are given below:—

**1099. Provision in managing agency contract :—**Under s. 87C of the old Act a provision in a managing agency contract providing for payment to the managing agent both an office allowance and remuneration was permissible. The minimum payment of remuneration to the managing agent in the absence or inadequacy of profits, was not the same thing as office allowance and was not in the nature of remuneration. It was not necessary that the contract should specify the number of clerks, peons etc. The word "defined" could not be construed to mean described in detail (74). When the managing agent had been wrongfully prevented from being in charge of the company, that could not be made a ground for refusing to pay him the stipulated office allowance up to the date of winding-up and under the circumstances he was entitled to that payment (74). In this case it was not an implied term of the agreement that the company should carry on business during the period specified in the contract. Hence neither office allowance nor remuneration after the date of liquidation could be claimed (74). In *Rhodes v. Forwood* (75) "the *ratio decidendi* was that where two parties agree for a fixed period, the one to employ the other as his sole agent for certain business, there is no implied condition that the business itself shall continue to be carried on during the period named. Lord Hatherley observed: 'The parties seem to me to have entered into a simple contract of agency which necessarily determines when the subject matter of the agency is gone. The subject-matter of the agency has disappeared without *mala fides* on either side. Therefore the contract is brought to an end by the course of events--by that happening which might necessarily have been expected to happen and which would have the effect of putting an end to the contract' (76). We think that the same consideration must also apply to the claim for office allowance" (76).

**1100. "Net profits" :—**"Net profits" of a joint-stock company, it has been held under s. 87C of the old Act, are the surplus of the estimated amount of the assets of the company after all its liabilities, including the amount of the contributed capital, have been deducted (77). But this definition, it is apprehended, does not apply to the present section. The practice of a company to make no deduction in respect of income-tax and super-tax paid by the company in calculating the net profits for calculation of the managing agent's commission is in accordance with law, but the same principle cannot be applied to excess profits tax which is essentially different from income-tax; consequently in the absence of an agreement to the contrary, the excess profits tax must be deducted in ascertaining the annual profits of a company for the purpose of calculation of the managing agent's commission (78). It was held in *Ashton Gas Co. v. Attorney-General* (79) that income-tax is payable out of profits, and cannot be deducted in ascertaining profits. See in this connection the case noted below (80).

In computing the net profits of the company upon which commission was to be paid to the managing agents as provided in the managing agency agreement read

(74) *Associated Industrial Engineers v. Jabbar Sahib* [1953] M. 197. [1952] 2 M.L.J. 378.

(75) [1876] 1 App. Cas. 256.

(76) *Associated Industrial Engineers v. Jabbar Sahib*, *supra* at pp. 201 and 202.

(77) *Binney v. Ince Hall Coal & Co.* [1866] 14 L.T. 392.

(78) *Walchand & Co. v. Hindusthan Construction Co.* [1914] B. 5, 45 Bom. L.R. 951.

(79) [1906] A.C. 10.

(80) *Edwards v. Sauton Hotel Co.* [1943] 1 A.E.R. 176.

with the articles of association, excess profits tax was to be deducted though s. 87C of the old Act did not govern the case as the managing agents had been appointed before the commencement of the Companies Amendment Act XXII of 1936 (81).

**350. Ascertainment of depreciation.**—The amount of depreciation to be deducted in pursuance of clause (k) of sub-section (4) of section 349—

(a) shall be the amount of normal depreciation allowable under the Indian Income-tax Act, 1922 (XI of 1922) for the financial year for which the net profits are to be computed;

(b) shall not include any special, initial or other depreciation or any development rebate, whether allowable under that Act or otherwise;

(c) shall not include any arrears of depreciation:

Provided that arrears of depreciation may be taken into account in the first of the financial years referred to in section 348, in so far as these arrears have not been taken into account in arriving at the net profits of any financial year or years preceding the first financial year aforesaid.

This section is new. It is based on the last para of sub-section (2) of the redraft of s. 87C at page 365 of the C. L. C. R.—*Notes on Clauses*.

In cls. (a) and (b) of this section some additions have been made by the Lok Sabha.

**351. Special provision where there is a profit-sharing arrangement between two or more companies.**—Where there is an arrangement between two or more companies to share their profits, and not less than two of those companies have the same managing agent, any profits paid in pursuance of the arrangement by any of the companies having that managing agent to any other or others of them shall—

(a) be excluded from the net profits of the company making such payment; and

(b) be included in the net profits of the company receiving such payment, or where more than one company receives such payment, be included in the net profits of each of the receiving companies, to the extent of the payment received by it.

This section is new. It is based on the last sub-para of para 130 at p. 99 of the C. L. C. R.—*Notes on Clauses*.

(81) *Western H. & G. Mills Ltd. v. Comr. of Income-Tax* [1953] *Punj.* 223 (F.B.).

**352. Payment of additional remuneration.**—Additional remuneration in excess of the limits specified in sections 198 and 348 may be paid to the managing agent if, and only if, such remuneration is sanctioned by a special resolution of the company and is approved by the Central Government as being in the public interest.

This section is new. It embodies the principle is sub-s. (1) of the redraft of s. 87C at page 365 of the C. L. C. R.—*Notes on Clauses*.

[S. 352 which dealt with minimum remuneration of managing agent has been omitted by the Lak Sabha as the question has been dealt with in s. 198 *ante*].

See notes to s. 349.

**353. Time of payment of remuneration.**—The remuneration payable to the managing agent for any financial year or part thereof shall not be paid to him, until the accounts of the company for such financial year have been audited and laid before the company in general meeting:

Provided that the minimum remuneration, if any, payable in pursuance of section 198 may be paid to the managing agent in such suitable instalments as may be specified either in the articles of the company or in a resolution passed by the company at an annual general meeting or in the managing agency agreement executed by the company

This section is new. It is based on sub-s. (3) of the new s. 87C at page 365 of the C. L. C. R.—*Notes on Clauses*.

**354. Managing agent not entitled to office allowance but entitled to be reimbursed in respect of expenses.**—The managing agent shall not be paid any office allowance, but he may be reimbursed in respect of any expenses incurred by him on behalf of the company and sanctioned by the Board or by the company in general meeting; and nothing contained in sections 348 to 353 shall be deemed to prohibit his being so reimbursed.

This section is new. It is based on para 128 of the C. L. C. R.—*Notes on Clauses*.

See N. 1009, *supra*

**355. Saving.**—Sections 348 to 354 shall not apply to a private company unless it is a subsidiary of a public company.

This section is new. It is based on the saving in sub-s. (5) of the new s. 87C at page 365 of the C. L. C. R.—*Notes on Clauses*.

### *Appointments as Selling and Buying Agents*

**356. Appointment of managing agent or associate as selling agent of goods produced by the company.**—(1) No managing agent and no associate of a managing agent, shall receive any commission

or other remuneration from the company, in respect of sales of goods produced by the managed company, if the sales are made from the premises at which they are produced or from the head office of the managing agent or from any place in India.

(2) For sales of any goods produced by the company which are effected from any place outside India not being a place specified in sub-section (1), the managing agent, or an associate of the managing agent, may be appointed as a selling agent subject to the following conditions, namely:—

(a) that the managing agent or associate maintains an office at such place for his own business, that is to say, for a business not connected with that of the company;

(b) that the remuneration payable in respect of the work done as selling agent by the managing agent or associate is in accordance with the terms of a special resolution passed by the company in that behalf; and

(c) that no other sums are payable by the company to the managing agent or associate whether by way of expenses or otherwise.

(3) Any appointment made in pursuance of sub-section (2) shall not be made for a term exceeding five years but may be renewed from time to time for a term not exceeding five years on each occasion:

Provided that such renewal shall not be effected earlier than one year from the date on which it is to come into force.

(4) The special resolution referred to in clause (b) of sub-section (2) shall set out the material terms subject to which the appointment of selling agent is made.

(5) Every appointment made under sub-section (2) and all particulars relating thereto shall be entered in a register maintained by the company for the purpose.

This section is new. It deals with the case where a managing agent or an associate of a managing agent is appointed selling agent of goods produced by the company. He will not be entitled to any additional remuneration for doing work as such selling agent except in the cases specified in sub-s (2). The period of one month referred to in recommendation (iii) of para 142 of the C. L. C. R. may be extended to three months in special circumstances set out in the resolution passed by the company—*Notes on Clauses.*

This was originally cl. 338 of the Bill in which alteration has been made by the Joint Committee with the following observation: "The Committee have provided that sales in India of goods produced by a company will not entitle its managing agent to any commission. The provision regarding the making of payment for goods received by the managing agent for sale, within one month of the date on which



the goods were supplied to him by the company, has been omitted. It is left to the company to make its own agreement in such cases" (*vide* J.C.R., para 131).

For definition of "associate of managing agent" see cl. (g) of s. 2 *ante*.

**357. Application of section 356 to case where business of company consists of the supply or rendering of any services.**—Where and in so far as the business of a company consists in the supply or rendering of any services, the provisions of section 356 shall apply in respect of any such business procured for the company by its managing agent or any associate of its managing agent from any place outside India, in like manner as those provisions apply in respect of sales of any goods produced by a company which are effected from that place.

This section is new. It makes the provisions of s. 356 applicable, where the business of the company consists of the supply or rendering of any services—*Notes on Clauses*. The Joint Committee have made changes in this section that are consequential upon those made in s. 356 (*vide* J.C.R., para 132).

See notes to s. 356.

**358. Appointment of managing agent or associate as buying agent for company.**—(1) No managing agent, and no associate of a managing agent, shall receive any payment whatever, from the company except expenses, if any, sanctioned under section 354 in respect of purchases of goods made on its behalf either in India, or in cases to which sub-section (2) does not apply, outside India.

(2) Where purchases of goods are made on behalf of a company by its managing agent or any associate of its managing agent, at any place outside India, then, if the managing agent or associate maintains an office at such place not only for such purchase but also for his own business, that is to say, for a business not connected with that of the company, he may receive, at the option of the company, either—

(a) such part of the expenses of such office as may reasonably be attributed to the purchases made on behalf of the company as aforesaid; or

(b) remuneration, by way of commission or otherwise, in respect of the work done by the managing agent or associate in making such purchases.

(3) In cases to which clause (a) of sub-section (2) applies, the maximum amount which may be paid to the managing agent shall be specified in a special resolution passed by the company; and in cases to which clause (b) of that sub-section applies, the remuneration payable to the managing agent or associate shall

be in accordance with the terms of a special resolution, passed by the company in that behalf.

(4) The special resolution referred to in sub-section (3) shall set out in sufficient detail the nature of the office maintained by the managing agent or associate outside India, the purposes for which it is maintained, the scale of its operations, the expenses incurred in maintaining the office, and the proportion of those expenses which may be reasonably attributed to the work done on behalf of the company.

(5) The special resolution shall not remain in force for a term exceeding three years but may be renewed from time to time for a term not exceeding three years on each occasion:

Provided that no renewal shall take place earlier than one year from the date on which it is to come into force.

(6) Every resolution passed in pursuance of this section shall be entered in a register maintained by the company for the purpose.

This section is new. It provides for a managing agent or an associate of the managing agent receiving commission in special circumstances where he is appointed a buying agent of the company. The C. I. C. has recommended that no commission need be paid for purchases made by a managing agent on behalf of a company, but it is well known that in cases where a managing agent managing several companies makes bulk purchases for fulfilling the needs of all the companies considerable economies result; and it is clearly desirable that in such cases the managing agent should be entitled at least to the outlay which he has had to incur. This section therefore provides for the vesting of a discretion in the company to allow reimbursement or a commission in cases where purchases are made by the managing agent outside the State in which the goods purchased are to be used, provided the managing agent or associate maintains an office at that place for his own business—*Notes on Clauses*.

This was originally cl. 340 of the Bill. The Joint Committee have provided in this section that in the case of all purchases made in India only the expenses incurred by the managing agent will be payable by the company (*vide J.C.R.*, para 133).

The Lok Sabha has made alterations in sub-ss. (4) and (5) of this section.

**359. Commission, etc., of managing agent as buying or selling agent of other concerns.—**(1) A company in general meeting may, by resolution, authorise its managing agent or any associate of its managing agent to retain any commission or other remuneration earned or to be earned by such agent or associate as the managing agent, secretaries and treasurers, manager, agent, secretary or selling or buying agent of any firm, body corporate or other concern in respect of any goods, power, freight, repairs or other services, for the sale, purchase, supply or rendering of

which a contract has been, or is to be, entered into by such firm, body or concern with the company, provided the prices or amounts charged to or received by the company are at rates which are not less favourable to the company than the market rates or which are otherwise reasonable.

(2) Every contract so entered into and all particulars relating thereto shall be entered in a separate register maintained by the company for the purpose.

This section is new. It gives effect to the recommendation in para 143 of the C. L. C. R.—*Notes on Clauses*.

This was originally cl. 341 of the Bill. In this it has been made clear by the Joint Committee that the company in general meeting may agree to a commission being paid on future transactions (*vide* J.C.R., para 123).

**360. Contracts between managing agent or associate and company for the sale or purchase of goods or the supply of services, etc.—**

(1) A company may, by special resolution, approve of any contract being entered into with its managing agent or an associate of its managing agent,—

(a) for the sale, purchase or supply of any property, movable or immovable, or for the supply or rendering of any service other than that of managing agent; or

(b) for the underwriting of any shares or debentures to be issued or sold by the company.

(2) The special resolution aforesaid shall—

(a) set out the material terms of the contract proposed to be entered into; and

(b) provide specifically that for any property supplied or sold, or any services supplied or rendered, by the company, the managing agent or associate shall make payment to the company within one month from the date of the supply or sale of the goods, or the supply or rendering of the service, as the case may be.

(3) Every such contract and all particulars relating thereto shall be entered in a separate register maintained by the company for the purpose.

(4) Nothing contained in clause (a) of sub-section (1) shall affect any contract or contracts for the sale, purchase or supply of any property or services in which either the company or the managing agent or associate, as the case may be, regularly trades or does business, provided that the value of such property and the cost of such services do not exceed five thousand rupees

in the aggregate in any calendar year comprised in the period of the contract or contracts.

This section is new. It relates to contracts between the managing agent or associate and the company for the sale or purchase of property or for underwriting shares or debentures etc. The section is based on para 144 of the C.L.C.R.—*Notes on clauses*.

Sub-s. (4) has been added to this section by the Lok Sabha.

**361. Existing contracts relating to matters dealt with in sections 356 to 360 to terminate on 1st March, 1958.**—All contracts in force at the commencement of this Act, to which a company or the managing agent or an associate of the managing agent of a company is a party, shall, in so far as the contracts relate to any of the matters referred to in sections 356 to 360, be deemed to terminate on the first day of March, 1958, unless they terminate on an earlier date.

This section is new. It gives effect to the last sentence of the recommendation of the C. L. C. R.'s Report in para 145 and provides for the termination of existing contracts which are contrary to the provisions contained in ss. 353 to 360 not later than 5 years from the date of publication of the Report which was in March, 1952—*Notes on Clauses*.

In view of the delay in passing this Act the date "first day of March 1957" has been changed by the Joint Committee into "first day of March, 1958" (*vide* J.C.R., para 135).

**362. Registers to be open to inspection.**—The registers referred to in sections 356 to 360 shall be open to inspection, and extracts may be taken therefrom and copies thereof may be required, by any member of the company, in the same manner, to the same extent and on payment of the same fees, as in the case of the register of members of the company.

This section is new. It is a consequential provision—*Notes on Clauses*.

**363. Remuneration received in contravention of foregoing sections to be held in trust for company.**—Where the managing agent of a company, or an associate of the managing agent, receives any sum from the company, whether directly or indirectly, by way of remuneration, rebate, commission, expenses or otherwise,—

(a) in the case of a public company or a private company which is a subsidiary of a public company, in contravention of sections 348 to 354 and sections 356 to 361; or

(b) in the case of a private company which is not a subsidiary of a public company, in contravention of sections 356 to 361;

the managing agent or associate shall account to the company for such sum as if he held it in trust for the company.

This section is new. It provides that remuneration received by managing agents otherwise than in conformity with the provisions of the Act should be held by them in trust for the company. It is based on the recommendation in the second sentence of para 145 of the C. L. C. R.—*Notes on Clauses*.

### *Assignment of, or charge on, remuneration*

**364. Company not to be bound by assignment of, or charge on, managing agent's remuneration.**—Any assignment of, or charge on, his remuneration, or any part thereof, effected by a managing agent shall be void as against the company.

This section shall not affect the rights *inter se* of the managing agent and any person other than the company.

This section corresponds to cl. (d) of s. 87B of the previous Act. It provides that a company will not be bound by any assignment of, or the creation of any charge on, the managing agent's remuneration; but the rights *inter se* of the managing agent and persons other than the company will not be affected—*Notes on Clauses*.

**1101.** The object of the restriction by this section is to prevent the managing agent from making a voluntary charge or assignment of his remuneration to the detriment of the company. This does not disentitle a creditor to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor (82).

### *Compensation for termination of office*

**365. Prohibition of payment of compensation for loss of office in certain cases.**—A company shall not pay or be liable to pay to its managing agent any compensation for the loss of his office in the following cases:—

(a) where the managing agent resigns his office in view of the reconstruction of the company or of its amalgamation with any other body corporate or bodies corporate and is appointed as the managing agent, secretaries and treasurers, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

(b) where the managing agent resigns his office, otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(c) where the managing agent vacates his office in pursuance of section 324, 330 or 332;

(d) where the managing agent is deemed to have vacated his office in pursuance of clause (a), (b), (c) or (d) of section 334 or of section 336;

(e) where the managing agent is deemed to have vacated his office in pursuance of clause (e) of section 334, provided the winding up of the company was due to the negligence or default of the managing agent;

(f) where the managing agent is deemed to have been suspended, or is suspended, from his office in pursuance of section 335 or sub-section (2) of section 340;

(g) where the managing agent is removed from office by a resolution in pursuance of section 337 or 338; and

(h) where the managing agent has instigated, or has taken part in bringing about, the termination of his office.

SS. 365 and 366 are new and are intended to give effect to the recommendation in para 124 and page 277 of the C. L. C. R. and the redraft suggested by the C. L. C. at page 363 of s. 87B (e)—*Notes on Clauses.*

**366. Limit of compensation for loss of office.**—The compensation which may be paid by a company to its managing agent for loss of office shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term, or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which his office ceased or was terminated, or where he held the office for a lesser period than three years, during such period:

Provided that in the event of the winding up of the company commencing, whether before, or at any time within twelve months after, the date of the cessation or termination of the office of managing agent, no compensation shall be payable to him if the assets of the company on the winding up, after deduction of the expenses thereof, are not sufficient to repay the share capital (including the premiums, if any) contributed by the members of the company.

See notes to s. 365.

The original cl. 349 of the Bill providing for damages for wrongful termination of office of a managing agent has been omitted by the Joint Committee.

*Other rights and liabilities not affected on termination of office*

**367. Managing agent's rights and liabilities after termination of office.**—Where the office of a managing agent ceases or is terminated—

(a) the managing agent and the company shall be entitled to enforce any claim or demand which each may have against the other, in respect of anything done or omitted to be done by either of them before the cessation or termination of the managing agency; and

(b) the rights and liabilities, in relation to the company, of the managing agent in any other capacity, shall not be affected.

This section is new. It in general gives effect to the recommendation of the C. L. C. in para 121 and pages 272 and 273 of their Report—*Notes on Clauses*.

### *Restrictions on powers*

**368. Managing agent to be subject to control of Board and to restrictions in Schedule VII.**—The managing agent of a company, whether appointed before or after the commencement of this Act, shall exercise his powers subject to the superintendence, control and direction of its Board of directors and subject also to the provisions of the memorandum and articles of the company and to the restrictions contained in Schedule VII.

This section is new. It lays down the general principle that a managing agent is subject to the control and direction of the directors. It is based on para 134, and the redraft of s. 87CC at page 366 of the C. L. C. R. In the case of the specific powers referred to in Schedule VII, the managing agent will be entitled to exercise them, unless the directors specifically impose any restriction on their exercise—*Notes on Clauses*.

The Lok Sabha has altered the heading of this section.

This was originally cl. 351 of the Bill in which alteration has been made by the Joint Committee with the following observation: "The words 'except to such extent as is otherwise provided in Schedule VII' which occur in cl. 351 of the original Bill are inaccurate as there is no provision of that nature in Schedule VII. The words have therefore been omitted; and it has been made clear that the managing agent of a company should exercise his powers subject to the control and direction of the Board of directors and also subject to the provision of the memorandum and articles of the company and the restrictions contained in Schedule VII" (*vide J.C.R., para 136*).

**369. Loans to managing agent.**—(1) No public company, and no private company which is a subsidiary of a public company, shall make any loan to, or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by,—

(a) its managing agent or any associate of its managing agent; or

(b) any body corporate in respect of which the Central Government, by order, declares that it is satisfied that the

Board of directors, managing director, managing agent, secretaries and treasurers or manager thereof is accustomed to act in accordance with the directions or instructions of the managing agent or associate of the managing agent, notwithstanding that the body corporate may not itself be an associate of the managing agent.

(2) Nothing contained in sub-section (1) or in section 295 shall apply to any credit given by the company to its managing agent for the purpose of facilitating the company's business and held by such agent in his own name in one or more current accounts, subject to limits previously approved by the directors of the company and on no account exceeding twenty thousand rupees in the aggregate.

This section corresponds to s. 87D of the previous Act. It is based on the redraft of s. 87D at page 369 and paras 136 and 137 of the C. L. C. R. See s. 295 (1) (d) and (e) *ante*.

SS. 369 and 370 were originally cls. 352 and 353 of the Bill in which alterations have been made by the Joint Committee with the following observation: "If a company gives a guarantee, or provides any security, in connection with a loan made to any other person by its managing agent or an associate of its managing agent, the prohibitions contained in these clauses should obviously apply. The Committee have secured this result by adding the words 'or, to any other person by', in the opening paragraph of the clauses" (*vide* J.C.R., para 137).

**1102. Sub-s. (1). Guarantee:**—The word "guarantee" has acquired a technical meaning and the legislature was aware of it. The essence of guarantee is that a guarantor agrees to discharge his liability only in one event, *i.e.*, when the principal debtor fails in his duty. In other words, a guarantee presupposes the existence of a principal debtor and if in any contract there never was at any time any other person who can be properly described as the principal debtor in respect of whose default a guarantee can be given, there is no "guarantee" either in its technical meaning or in its ordinary meaning. So a promissory note executed jointly by a company and its managing agents does not come within the purview of this section (83).

**370. Loans etc., to companies under the same management.**—No company (hereinafter in this section referred to as "the lending company") shall—

(a) make any loan to, or

(b) give any guarantee, or provide any security, in connection with a loan made by any other person to, or to any other person by,

any body corporate which is under the same management as the lending company, unless the making of such loan, the giving of such guarantee or the provision of such security has been previously authorised by a special resolution of the lending company.



*Explanation.*—For the purposes of this sub-section, two bodies corporate shall be deemed to be under the same management—

(i) if the managing agent, secretaries and treasurers, managing director or manager of the one body, or where such managing agent or secretaries and treasurers are a firm, any partner in the firm, or where such managing agent or secretaries and treasurers are a private company, any director of such company, is—

(a) the managing agent, secretaries and treasurers, managing director or manager of the other body; or

(b) a partner in the firm acting as managing agent or secretaries and treasurers of the other body; or

(c) a director of the private company acting as managing agent or secretaries and treasurers of the other body; or

(ii) if a majority of the directors of the one body constitute, or at any time within the six months immediately preceding constituted, a majority of the directors of the other body.

(2) Nothing contained in sub-section (1) shall apply to any loan made, guarantee given or security provided—

(a) by a holding company to its subsidiary; or

(b) by the managing agent or secretaries and treasurers to any company under his or their management.

This section corresponds to s. 87E of the previous Act. It gives effect to the principle contained in that section as modified by para 138 of the C. L. C. R. and the redraft of s. 87E at page 370 of the Report—*Notes on Clauses*.

See notes to s. 369.

**371. Penalty for contravention of section 369 or 370.**—(1) Every person who is a party to any contravention of section 369 or 370, including in particular any person to whom the loan is made, or in whose interest the guarantee is given or the security is provided, shall be punishable with fine which may extend to five thousand rupees or with simple imprisonment for a term which may extend to six months:

Provided that where any such loan, or any loan in connection with which any such guarantee or security has been given or provided by the lending company, has been repaid in full, no punishment by way of imprisonment shall be imposed under this sub-section; and where the loan has been repaid in part, the

maximum punishment which may be imposed under this sub-section by way of imprisonment shall be proportionately reduced.

(2) All persons who are knowingly parties to any such contravention shall be liable, jointly and severally, to the lending company for the repayment of the loan, or for making good the sum which the lending company may have been called upon to pay in virtue of the guarantee given or the security provided by such company.

This section corresponds to s. 87D (3) and s. 87E (2) of the previous Act. It is consequential on ss. 369 and 370 and is intended to implement the provisions contained in those sections—*Notes on Clauses*.

**1102A.** Under s. 87D (3) of the old Act it has been held that the only person who could be punished was the director who was a party to the making of the loan or giving of the guarantee. Where the promissory note was executed by the managing director and not by the other director, the latter could not be held guilty (83).

The provision contained in s. 87D of the old Act was a penal provision and as such was to be construed strictly ((83)).

**372. Purchase by company of shares, etc., of other companies in same group.**—(1) A company (hereinafter in this section and section 373 referred to as “the investing company”) shall not be entitled to subscribe for, or purchase, the shares or debentures of any body corporate belonging to the same group as the investing company, except to the extent and except in accordance with the restrictions and conditions specified in this section.

(2) The Board of directors of the investing company shall be entitled to invest in any shares or debentures of any other body corporate in the same group up to ten per cent. of the subscribed capital of such other body corporate:

Provided that the aggregate of the investments so made by the Board in all other bodies corporate in the same group shall not exceed twenty per cent. of the subscribed capital of the investing company.

(3) The investing company shall not make any investment in the shares or debentures of any other body corporate in the same group, in excess of the limits specified in sub-section (2) and the proviso thereto, unless the investment is sanctioned by a resolution of the investing company and unless further it is approved by the Central Government.

(4) No investment shall be made by the Board of directors of a company in pursuance of sub-section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with

the consent of all the directors present at the meeting, except those not entitled to vote thereon, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in section 286.

(5) Every company shall keep a register of all investments made by it in shares and debentures of bodies corporate in the same group, showing, in respect of each investment, the following particulars:—

(a) the name of the body corporate in which the investment is made;

(b) the date on which the investment is made; and

(c) the nature and extent of the investment.

(6) Particulars of every investment to which sub-section (5) applies shall, within three days of the making thereof, be entered in the register aforesaid.

(7) If default is made in complying with the provisions of sub-section (5) or (6), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

(8) The register aforesaid shall be kept at the registered office of the company, and shall be open to inspection at such office; and extracts may be taken therefrom and copies thereof may be required, by any member of the company to the same extent, in the same manner, and on payment of the same fees as in the case of the register of members of the company; and the provisions of section 163 shall apply accordingly.

(9) Every company shall annex to each balance sheet prepared by it after the commencement of this Act, a list of the bodies corporate in the same group in the shares or debentures of which investments have been made by it, and the nature and extent of the investments so made in each such body corporate.

(10) For the purposes of this section, a body corporate shall be deemed to be in the same group as the investing company—

(a) if the body corporate is the managing agent of the investing company; or

(b) if the body corporate and the investing company should, in virtue of the *Explanation* to sub-section (1) of section 370, be deemed to be under the same management.

(11) The provisions of this section [except sub-section (9)] shall apply to an investment company, that is to say,, to a company whose principal business is the acquisition of shares, stock, debentures or other securities.

(12) This section shall not apply—

(a) to any banking or insurance company;

(b) to a private company, unless it is a subsidiary of a public company;

(c) to investments by a holding company in its subsidiary, or

(d) to investments by a managing agent or secretaries and treasurers in a company managed by him or them.

This section is based on s. 87F of the previous Act and para 139 and pages 287 and 288 of the C.L.C.R.—*Notes on Clauses*.

This was originally cl. 355 of the Bill in which alterations have been made by the Joint Committee with the following observation : "The Committee consider it necessary to provide for the passing of a special resolution by the company for making the investments referred to in sub-clause (3). Instead, the Committee consider it more useful to add the safeguard of approval by the Central Government. Sub-clauses (5) to (8) provide for the maintenance of a register of investments and for all consequential provisions in relation thereto. The period within which companies are to dispose of all existing investments in excess of the limits imposed by this clause has been extended from one year to two years, from the commencement of the Act" (*vide* J.C.R., para 138).

The Lok Sabha has made some alterations in sub-s. (4) of this section.

**1103. Investment company.**—An "investment company" has been defined in sub-s. (11) of this section. In s. 20 (1) of the English Finance Act, 1936 an "investment company" has been defined as a company the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in s. 14 (3) of the English Income Tax Act, 1918 (84). A company is not an "investment company" within the meaning of s. 20 (1) of the English Finance Act, 1936, where the receipts from investments are more than counter-balanced by its trading losses, and in consequence, for the period taken into account in deciding whether its income consisted mainly of investment income, it had no income at all (84).

**373. Investments made before commencement of Act.**—Where any investments have been made by a company at any time after the first day of April, 1952, which, if section 372 had been then in force, could not have been made except on the authority of a resolution passed by the investing company and the approval of the Central Government, the authority of the company by means of a resolution and the approval of the Central Government shall be obtained to such investments, within six months from the commencement of this Act; and if such authority and approval are not so obtained, the Board of directors of the com-

(84) F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs. [1941] 113 L.J.K.B. 339 (H.L.).

pany shall dispose of the investments, in so far as they may be in excess of the limits specified in sub-section (2) of section 372 and the proviso to that sub-section, within two years from the commencement of this Act.

This section is new. It is intended to give effect to recommendation (c) at page 288 of the C.L.C.R. Although the Report was published on 11th March, 1952 it is considered desirable to give effect to the provision from the 1st April, 1952 which seems to be the more convenient date—*Notes on Clauses*.

This was originally cl. 356 of the Bill in which alteration has been made by the Joint Committee with the following observation : "Here again the requirement of a special resolution has been altered by the Committee into the requirement of an ordinary resolution coupled with the approval of the Central Government" (*vide J.C.R.*, para 139). See notes to the last section.

**374. Penalty for contravention of section 372 or 373.**—If default is made in complying with the provisions of section 372 or 373, every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.

This new section has been inserted by the Joint Committee.

**375. Managing agent not to engage in business competing with business of managed company.**—(1) A managing agent shall not engage on his own account in any business which is of the same nature as, and directly competes with, the business carried on by a company of which he is the managing agent or by a subsidiary of such company, unless such company by special resolution permits him to do so.

(2) For the purposes of sub-section (1), a managing agent shall be deemed to be engaged in business on his own account, if such business is carried on by—

(a) a firm in which he is a partner; or

(b) a private company at any general meeting of which not less than twenty per cent. of the total voting power may be exercised or controlled by any of the following persons, or by any two or more of them acting together, namely, (i) the managing agent aforesaid; (ii) where such managing agent is a firm, any partner in the firm; and (iii) where such managing agent is a body corporate, any officer of the body corporate;

(c) a body corporate (not being a private company) at any general meeting of which not less than seventy per cent. of the total voting power may be exercised or controlled by any of the following persons, or by any two or more of them acting together, namely, (i) the managing agent

aforesaid; (ii) where such managing agent is a firm, any partner in the firm; and (iii) where such managing agent is a body corporate, any officer of such body corporate.

(3) If a managing agent engages in any business in contravention of this section, he shall be deemed to have received all profits and benefits accruing to him from such business, in trust for the company under his management or the subsidiary of such company, as the case may be; and where such profits and benefits are deemed to have been so received by the managing agent in trust for two or more such companies or subsidiaries, such profits and benefits shall be held by the managing agent in trust for each of them in such proportions as may be agreed upon between them or, failing such agreement, as may be decided by the Court.

This section is based on s. 87H of the previous Act and para 140, page 289, and the redraft at page 371 of the C.L.C.R.—*Notes on Clauses*.

**376. Condition prohibiting reconstruction or amalgamation of company except on continuance of managing agent etc. to be void.—**

Where any provision in the memorandum or articles of a company, or in any resolution passed in general meeting by, or by the Board of directors of, the company, or in an agreement between the company and its managing agent or any other person, whether made before or after the commencement of this Act, prohibits the reconstruction of the company or its amalgamation with any other body corporate or bodies corporate, either absolutely or except on the condition that the managing director, managing agent, secretaries and treasurers, or manager of the company is appointed or re-appointed as secretaries and treasurers, managing director, managing agent, or manager of the reconstructed company or of the body resulting from amalgamation, as the case may be, shall become void with effect from the commencement of this Act, or be void, as the case may be.

This section is new. It gives effect to the recommendation in the penultimate sentence of para 124 at page 94 of the C.L.C.R.—*Notes on Clauses*.

**377. Restrictions on right of managing agent to appoint directors.—**

(1) The managing agent of a company may, if so authorised by its articles, appoint not more than two directors where the total number of the directors exceeds five, and one director where the total number does not exceed five.

(2) The managing agent may, at any time, remove any director so appointed, and appoint another director in his place or in the place of a director so appointed who resigns or otherwise vacates his office.

(3) Any provision contained in the articles of, or in any agreement with, the company, authorising the managing agent to appoint more than the number of directors authorised under sub-section (1), which is in force immediately before the commencement of this Act, shall, in regard to the excess, [by (be?)] void, with effect from the expiry of one month from such commencement.

(4) Where at the commencement of this Act, the number of directors appointed by the managing agent exceeds the number authorised under sub-section (1), the managing agent shall determine which of them shall continue to hold office, and intimate the choice made by him to the company before the expiry of one month from such commencement; and only the director or directors so chosen shall continue to hold office as directors after such expiry.

(5) If no choice is made by the managing agent as aforesaid, all the directors appointed by him shall, with effect from the expiry of one month from the commencement of this Act, be deemed to have vacated their offices.

This section corresponds to s. 871 of the previous Act. It gives effect to the recommendation in para 84 of the C.L.C.R. which limits the number of directors who may be appointed by the managing agent to one-third of the strength sanctioned by the articles. It has been made clear that the managing agent may remove any director appointed by him and replace him by some one else. Provision has also been made for the manner of application of the clause to cases where at the time of coming into operation of this Act, more than one-third of the directors have been appointed by the managing agent—*Notes on Clauses*.

This was originally cl. 359 of the Bill which has been altered by the Joint Committee with the following observation: "The main complaint against the managing agency system is that the managing agents by virtue of provisions in their agreements, acquire a right to make nominations up to one-third of the directorate of the company. By exercising this right and by securing the appointment by the general body to the remaining two-thirds of the directorate, of persons closely connected with them, managing agents are in most cases able to obtain comfortable working majority in the Boards of directors of the companies with which they are concerned. The second danger is obviated in a large measure by clause 260 (now s. 261) which requires a special resolution for the appointment of persons connected with managing agents. The Joint Committee consider that to permit managing agents to nominate even one-third of the directorate (a limit imposed by the amending Act of 1936) will be to confer on them an excessive right, especially where the directorate is large. In the opinion of the Committee a managing agent should in no case have a right to nominate more than two directors or one-third of the directorate whichever is smaller. Accordingly, under clause 377 as altered by the Committee, the managing agent can nominate not more than two directors where the total number of directors exceeds five, and one director where the total number does not exceed five" (*vide J.C.R., para 140*).

In sub-s. (3) the word "by" within square brackets is apparently a mistake for "be".

## CHAPTER IV

### A. SECRETARIES AND TREASURERS

**378. Appointment of secretaries and treasurers.**—Subject to the provisions of this Chapter, a company may appoint a firm or body corporate as its secretaries and treasurers:

Provided that no company shall, at the same time, have both a managing agent and secretaries and treasurers.

The new sections 378 to 383 have been introduced by the Joint Committee with the following observations : "The Committee have no wish to make changes in the system of 'secretaries and treasurers' who ordinarily exercise much the same functions as 'managing agents' or 'managers' but with this vital difference, namely, that 'secretaries and treasurers' have no right to appoint any of their nominees to the directorate. The system is free from most of the abuses to which the managing agency system has unfortunately been subject. The Committee consider it very desirable to give statutory recognition to the system of secretaries and treasurers, laying adequate emphasis on the safeguards subject to which alone the office can be held. The definition of 'secretaries and treasurers' makes it clear that only a firm or body corporate can hold that office but that in other respects, 'secretaries and treasurers' should fulfill all the requirements of the definition of 'manager'. Provision is made in clauses 378 to 383 for the appointment, functions and powers, and remuneration of secretaries and treasurers. 'Secretaries and treasurers' cannot be appointed when there is a managing agent (proviso to clause 378). The Government will have no power to notify that there shall be no secretaries and treasurers in companies engaged in particular classes of business (clause 380). The remuneration will be subject to a maximum of 7½ per cent. as against the 10 per cent. fixed for managing agents (clause 381). Secretaries and treasurers cannot be appointed as selling or buying agents either by the articles or by the agreement entered into by them with their companies but only by the Board of Directors and to the extent determined by the Board (clause 383)" (*vide* J.C.R., para 141).

An inkling into the object of introducing these provisions may be had from the speech of Sri C. D. Deshmukh in the Lok Sabha on 19th August, 1955 in reply to the debate on the Companies Bill. He said : The secretary and treasurer was a corporate manager. That is to say, half a dozen people came together and divided the work. There might be a financial expert, there might be a product expert, there might be some one else who has just passed out of the business school in Harvard or—"We hope to establish an institute"—had obtained a diploma or degree here. There was no reason why young people here should not get together after being trained in business administration and start firms as corporate managers, that is to say, as secretaries and treasurers . . . . It was his hope that in course of time "we shall have a body of secretaries and treasurers who will not come from the traditional classes."

**379. Provisions applicable to managing agents to apply to secretaries and treasurers with the exceptions and modifications specified in sections 380 to 383.**—Subject to the exceptions and modifications specified in sections 380 to 383,—

(a) all the provisions of this Act applicable to, or in



relation to, a managing agent which is a firm or body corporate shall apply to secretaries and treasurers; and

(b) all the provisions of this Act applicable to, or in relation to, any person or persons connected or associated in any manner with such a managing agent shall apply to, or in relation to, any person or persons connected or associated with secretaries and treasurers in the like manner; and

subject as aforesaid, all references in this Act to a managing agent or any person or persons connected or associated in any manner with a managing agent shall be construed accordingly, as including a reference to secretaries and treasurers or to the person or persons connected or associated with them in the like manner.

See notes to s. s. 378.

**Form** :—For the form of application to the Central Government (1) for appointment or re-appointment of Secretaries and Treasurers (2) for approval of changing constitution of a firm, and (3) for approval of change of constitution of a body corporate, acting as Secretaries and Treasurers, see Forms Nos. 25, 27 and 28 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**380. Sections 324, 330 and 332 not to apply.**—Sections 324, 330 and 332 shall not apply to secretaries and treasurers.

See notes to s. 378.

**381. Section 348 to apply subject to a modification.**—Section 348 shall apply to secretaries and treasurers subject to the modification that for the words "ten per cent. of the net annual profits" occurring in the section, the words "seven and a half per cent. of the net annual profits" shall be substituted.

See notes to s. 378.

**382. Secretaries and treasurers not to appoint directors.**—Secretaries and treasurers shall have no right to appoint any director of the company; and sections 377 and 261 shall not apply to, or in relation to, secretaries and treasurers, or persons connected or associated with them in the manner in which the persons specified in section 261 are connected or associated with managing agents.

See notes to s. 378.

**383. Secretaries and treasurers not to sell goods or articles produced by company, etc., unless authorised by Board.**—Secretaries and treasurers shall have no right, unless, and except to the extent

to which, they are authorised by the Board of directors, to sell any goods or articles manufactured or produced by the company, or to purchase, obtain, or acquire machinery, stores, goods or materials for the purposes of the company, or to sell the same when no longer required for those purposes.

See notes to s. 378.

## B. MANAGERS

### **384. Firm or body corporate not to be appointed manager.—**

No public company, and no private company which is a subsidiary of a public company, shall, after the commencement of this Act, appoint or employ, or after the expiry of six months from such commencement, continue the appointment or employment of, any firm, body corporate or association as its manager.

The provisions relating to "Managers" contained in ss. 384 to 388 have been brought together in this Part of Chapter IV by the Joint Committee (*vide* J.C.R., para 142).

This was originally cl. 294 of the Bill which gave effect to recommendation (i) in para 146 of the C.L.C.R.—*Notes on Clauses*.

**385. Certain persons not to be appointed managers.—(1)** No company shall, after the commencement of this Act, appoint or employ, or continue the appointment or employment of, any person as its manager who—

(a) is an undischarged insolvent, or has at any time within the preceding five years been adjudged an insolvent; or

(b) suspends, or has at any time within the preceding five years suspended, payment to his creditors; or makes, or has at any time within the preceding five years made, a composition with them; or

(c) is, or has at any time within the preceding five years been, convicted by a Court in India of an offence involving moral turpitude.

(2) The Central Government may, by notification in the Official Gazette, remove the disqualification incurred by any person in virtue of clause (a), (b), or (c) of sub-section (1), either generally or in relation to any company or companies specified in the notification.

See notes to s. 384.

This was originally cl. 295 of the Bill. "This gives effect to the recommendation embodied in sub-clause (c) of new section 87 (J) (1) at page 373 of the Company Law Committee's Report. Power has been given to the Central Government to remove

the disqualification. The power is intended to be exercised where it will be unjust to apply the prohibition contained in sub-clause (1) of the clause, for instance, by reason of the lapse of a number of years after the adjudication in insolvency or conviction of a criminal offence"—*Notes on Clauses*.

Sub-s. (3) inserted by the Joint Committee has been omitted by the Lok Sabha with the result that this section applies to all companies including private companies.

**386. Number of companies of which a person may be appointed manager.**—(1) No company shall, after the commencement of this Act, appoint or employ any person as manager, if he is either the manager or the managing director of any other company, except as provided in sub-section (2).

(2) A company may appoint or employ a person as its manager, if he is the manager or managing director of one, and not more than one, other company:

Provided that such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting, and of which meeting and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

(3) Where, at the commencement of this Act, any person is holding the office either of manager or of managing director in more than two companies, he shall, within one year from the commencement of this Act, choose not more than two of those companies as companies in which he wishes to continue to hold the office of manager or managing director, as the case may be; and the provisions of clauses (b) and (c) of sub-section (1) and of sub-sections (2) and (3) of section 276 shall apply *mutatis mutandis* in relation to this case, as those provisions apply in relation to the case of a director.

(4) Notwithstanding anything contained in sub-sections (1) to (3), the Central Government may, by order, permit any person to be appointed as a manager of more than two companies, if the Central Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common manager.

(5) This section shall not apply to a private company, unless it is a subsidiary of a public company.

This section reproduces the original cl. 292 of the Bill in so far as it relates to managers, cl. 292 being confined in its operation to managing directors (*vide* J.C.R., para 143).

Sub-ss. (4) and (5) have been added by the Lok Sabha.

**387. Remuneration of manager.**—The manager of a company may, subject to the provisions of section 198, receive remuneration either by way of a monthly payment, or by way of a specified percentage, not exceeding five, of the “net profits” of the company calculated in the manner laid down in sections 349, 350, and 351, or partly by the one way and partly by the other.

This section is new. It has been inserted by the Joint Committee with the following remark : “This clause provides for a limit on the remuneration of the manager. Not more than five per cent. of the net profits may be paid to a Manager” (*vide* J.C.R., para 144).

**388. Application of sections 310, 311, 312 and 317 to managers.**—The provisions of sections 310, 311 and 317 shall apply in relation to the manager of a company as they apply in relation to a managing director thereof, and those of section 312 shall apply in relation to the manager of a company, as they apply to a director thereof.

This section is new. It has been inserted by the Joint Committee with the following observation : “This clause provides for the application of clauses 311 and 316 to the case of managers, these clauses having been restricted to directors in accordance with the arrangement of Chapters adopted by the Committee (*vide* J.C.R., para 145). But the Lok Sabha has replaced that section by the present one.

**Form** :—For the form of application to the Central Government for increasing remuneration of a manager, in pursuance of this section read with ss. 310 and 311, see Form No. 26 in Annexure ‘A’ of the Companies (Central Government’s) General Rules and Forms, 1956—printed as Appendix B.

## CHAPTER V

### ARBITRATION, COMPROMISES, ARRANGEMENTS AND RECONSTRUCTIONS

**389. Power for companies to refer matters to arbitration.**—

(1) A company may, by written agreement, refer to arbitration, in accordance with the Arbitration Act, 1940 (X of 1940), an existing or future difference between itself and any other company or person.

(2) A company which is a party to an arbitration may delegate to the arbitrator power to settle any terms or to determine any matter, capable of being lawfully settled or determined by the company itself, or by its Board of directors, managing director, managing agent, secretaries and treasurers, or manager.

(3) The provisions of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations in pursuance of this Act to which a company is a party.

This section corresponds to s. 152 of the previous Act.

**1104. Object :—**This section is merely an enabling section (85). The real object of this section is to extend the operation of the Arbitration Act even to cases in which the subject-matter of disputes could not be made subject of arbitration under the Arbitration Act (85). This section is subject to the applicability of the Arbitration Act to the local area in which the Court in which the suit has been instituted is situate (86). Where the Arbitration Act has not been made applicable, as for instance, to the Ferozepore District in the Punjab, a civil Court cannot proceed with a reference to arbitration under that Act. It was not the intention of the legislature to make the Arbitration Act applicable to the whole of British India with regard to disputes between companies or between a company and other persons (86).

After the enactment of the Companies Act, 1913 and before the Arbitration Act, 1940 came into force, a company could only enter into an arbitration under the provisions of the Arbitration Act of 1899 and consequently companies were outside the scope of Sch. II, C. P. Code (87).

**1105. Construction :—**The words "arbitration and award" in s. 14 of the Arbitration Act (IX of 1899) (repealed) and para. 15, Sch. II, C. P. Code respectively allow of no distinction, and the difference in phrasology is immaterial (88). The word "may" after the words "a company" in the beginning of this section does not go with the sentence "in accordance" &c. but with the words "refer to arbitration." Again the existence of the words "in accordance" &c. in sub s. (1) is an indication that the legislature considered it to be *de rigueur* that every reference by a limited company to arbitration should be in accordance with the Arbitration Act. Sub-s. (3) is conclusive on the point that the provisions of the Arbitration Act only apply to arbitration to which a limited company is a party. Such companies cannot refer to arbitration independent of this provision of the law, and Schedule II of the Code of Civil Procedure has no application (89). This view has also been taken by the Calcutta High Court (R. C. Mitter & Lodge JJ.) in a recent case (90), dissenting from the view taken by a Full Bench of the Lahore High Court in *Sita Ram v. Punjab National Bank* (91). Their Lordships of the Calcutta High Court in the case (90) referred to above said : "The concluding words of that sub-section [sub-s. 3] of s. 152 of the Companies Act] 'in pursuance of this Act,' words which had troubled the minds of the Judges constituting the Full Bench of the Lahore High Court [in *Sita Ram v. Punjab National Bank* (91)],—mean that sections 3 to 22 of the Indian Arbitration Act, 1899 would apply to all arbitrations in which one or both the parties are companies irrespective of the *locus* of the subject matter by the *force and effect of the Indian Companies Act*, and the procedure provided for the Indian Arbitration Act for extending its field of operation would not have to be followed in such cases. This is in our judgment the effect of sub-s. (3) of s. 152. The words 'in pursuance of this Act' (*i.e.*, the Companies Act) clearly qualify the phrase 'shall

(85) *Sundar Mal v. Paris Business Co-operation Ltd.* [1931] L. 555, 132 I.C. 399 ; *Sitaram v. Punjab National Bank* [1936] L. 721 (F.B.), 17 Lah. 722.

(86) *Ibid.*

(87) *Catholic Bank v. Albuquerque* [1944] M.L.J. 290 (F.B.), [1944] M.W.N. 203.

(88) *Raoji v. Ratansi* [1930] B. 431, 54 Bom. 696, 32 Bom. L.R. 389, 126 I.C. 395.

(89) *Peoples Bank of N. India v. Padam Lal* [1938] 177 I.C. 659.

(90) *Jhifghat Native Tea Co. v. B. Gupta* [1940] C.W.N. 285, [1940] 1 Cal. 558, [1940] C. 227.

(91) *Sitaram v. Punjab National Bank* (supra).

apply'. The meaning is that the provisions of the Indian Arbitration Act, 1899, except s. 2 thereof (which is to be treated as non-existent) shall apply to all arbitrations between companies and persons by the force and effect of the Companies Act itself. The decision of the Full Bench of the Lahore High Court has the effect of substituting for the words 'in pursuance of this Act' used by the legislature the words 'in pursuance of sub-sec. (1)' or the words 'in pursuance of this section'. On the interpretation we have put upon sub-sec. (3) of s. 152, sec. 3 and sec. 4 (a) of the Indian Arbitration Act, 1899 would apply to all arbitrations in which a company is a party." An award made in such an arbitration must be filed either in the High Court or the Court of the District Judge, as the case may be, and paras 20 and 21 of Schedule II to the Code of Civil Procedure are excluded from operation upon such arbitration (90). When an application to file an award is made to the wrong Court it should not be dismissed but returned for presentation to the proper Court (90). But in a recent case (92) the Madras High Court has held that the fact that in sub-s. (3) the expression "in pursuance of this Act," comes after the words "shall apply to all arbitrations between companies and persons" indicates that the provisions of the Arbitration Act, 1899, were to apply only to those arbitrations made in pursuance of the Act, i.e., in pursuance of sub-s. (1). The fact that a power is given to refer a matter by an agreement in writing in accordance with the provisions of the Arbitration Act does not take away the power to refer the matter otherwise than in accordance with the Arbitration Act. The expression "may by written agreement refer to arbitration in accordance with the Arbitration Act" in sub-s. (1) means that if a company wishes to refer to arbitration in accordance with the Arbitration Act, it can do so by a written agreement; and this carries with it the implication that the reference to arbitration in accordance with Schedule II of the Code of Civil Procedure is open to a company if it does not wish to avail itself of the provisions of the Arbitration Act (92). Sch. II of the Code of Civil Procedure has been repealed by s. 49 of the Arbitration Act X of 1940.

**1106. Applicability :-** The Arbitration Act applied in the case falling within the scope of that Act even when the *locus* of the subject matter was outside a Presidency town, provided one of the parties or both of them were companies registered under this Act. Consequently a reference to arbitration, in which a company was interested, with the intervention of the Court was governed by the rules in Sch. II of the Code of Civil Procedure. The Arbitration Act, 1899 had no application to such a case (93). But since 1st July, 1940 on which the Arbitration Act, 1940 came into force, such cases would be governed by Chapter IV of that Act. The Arbitration Act applied to all references to arbitration under the Companies Act (94), wherever they took place within a Presidency town or in a place to which the Local Government had extended the provisions of the Arbitration Act, 1899 by virtue of the proviso to s. 2 of that Act (95). This section applies to those cases only in which a company by written agreement refers a matter in dispute to arbitration in accordance with the provisions of the Arbitration Act. It does not apply to a case where a reference is made by the Court in a pending suit (96). A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by the Punjab Act I of 1911. Therefore if an agreement be-

(92) *Karnataka Bank v. Thakur Singaraya* [1944] M. 95. [1913] 2 M.L.J. 488, [1913] M.W.N. 672 dissenting from *Jhirghat Native Tea Co. v. B. Gupta*, supra, and following *Sitaram v. Punjab National Bank*, supra.

(93) *East Bengal Bank v. Jogesh* [1941] C. 127. 44 C.W.N. 828. [1940] 2 Cal. 237.

(94) *Kewal Krishna v. Punjab National Bank* [1934] Pesh. 107. 151 I.C. 860; *Grahams Trading Co. v. Chandulal* [1935] S. 228. 159 I.C. 824; *Peoples Bank of N. India v. Padam Lal* (supra); *Jhirghat Native Tea Co. v. B. Gupta* (supra).

(95) *Behari v. Sirsa Trading Co.* [1938] L. 44. 141 I.C. 64; *Ruplal v. Dhansar Coal Co.* [1932] 136 I.C. 445.

(96) *Punjab & Kashmir Bank v. Damodri* [1936] L. 257.

tween the parties of which one is a company makes no specific reference to the Arbitration Act, that Act will not apply to the arbitration agreement between the parties (97).

It is not obligatory that any references to arbitration to which a limited company is a party should be made under the Arbitration Act (98).

**1107. Arbitrations under this section and s. 494 : distinction :—**This section empowers a company to refer to arbitration an existing difference between itself and any other company or person. But a shareholder has no such right against the company (99). The arbitration contemplated in s. 494 is one between the company in liquidation and one or more of its members—an arbitration to settle an internal dispute or difference. Sub-s. (3) of the present section would not cover such a case, as the arbitration contemplated there is one between a company and either another company or an individual third party, i.e., an arbitration to settle not an internal but an external dispute or difference (1). See notes to s. 494.

**1108. Decree if nullity :—**Where the parties referred a dispute to arbitration but had not agreed to do so in writing, an award was made therein and the Court passed a decree in terms of the award : it was held that the decree was not a nullity and it was not open to the executing Court to go behind the decree (2). Where a company entered into an agreement for reference to arbitration, but it was not specifically stipulated that it was to be under the Arbitration Act, and the award was filed and a decree passed thereon, it was held that the decree was a nullity and could not be executed. But the award itself was enforceable as a decree under s. 15 of the Arbitration Act (3). In the last cited case the Peshwar Court followed the decision of Mukherji and Guha JJ. in *Rabindra v. Jnanendra* (4) affirmed by the Judicial Committee [see *Jnanendra v. Rabindra* (5)] with these words: "Their Lordships agree with the view taken by the Courts in India that the decree . . . was passed without jurisdiction and was, therefore, incapable of execution as such. The respondent, however, as a party to the arbitration award would be entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. If, therefore, there was an existing award in favour of the respondent, the objection to his application was one of form only and not of substance."

**1109. Reference to arbitration :—**A contract to refer to arbitration any dispute which might arise between a company and an individual is not illegal because it is not under the seal of the company (6). Although a living company is allowed to refer matters in difference to arbitration, an official liquidator may not be allowed to make a reference to private arbitration (7). Where an agreement was made with a company to refer to arbitration under certain contingencies, a Court had no jurisdiction to file the agreement as s. 3 of the old Arbitration Act excluded Sch. II, para 17. C. P. C. from operation of the Act (8). Where the articles of asso-

(97) *Chandu Lal v. Grahams Trading Co.* (supra).

(98) *Lyalpur Bank v. Jai Gopal* [1940] L. 97, 190 I.C. 146 following *Balmukand v. Punjab National Bank* [1936] L. 721, 17 Lah. 722 (F.B.).

(99) *Madura Mills Co. v. Krishna Ayyar* [1937] M. 405, 171 I.C. 690.

(1) *Jhinighat Native Tea Co. v. B. Gupta* (supra).

(2) *Roshan Lal v. Punjab National Bank* [1933] L. 46, 140 I.C. 180.

(3) *Punjab National Bank v. Kewal Krishna* [1933] Pesh. 66, 143 I.C. 135 ; see also *Peoples Bank of N. India v. Padam Lal* (supra).

(4) [1932] 35 C.W.N. 538, 58 Cal. 1018

(5) [1933] P.C. 61.

(6) *Ganges Sugar Works v. Nuri Miah* [1915] 37 All. 273, 13 A.L.J. 312.

(7) *Dehra Dun Mussooree Tramways Co.* [1928] A. 553, 26 A.L.J. 810, 50 All. 867.

(8) *Attock Oil Co. v. Abdul Majid* [1929] L. 246, 118 I.C. 533. But see *Sita Ram v. Punjab National Bank* supra.

ciation provide for arbitration of a dispute between the company and its members, the latter can validly refer to arbitration a dispute relating to the question whether he was a member of the company in respect of some further shares for which he was registered as a member (9).

**1110. Enforcement of award :—**An award under the Arbitration Act, 1899 could only be enforced by the District Judge (10). But it was not obligatory on a company governed by the Arbitration Act to make a reference to arbitration out of Court in the province of Punjab only in pursuance of the provisions of the Arbitration Act and to file an award made on such reference in the Court of the District Judge as required by the Arbitration Act. It was permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference was filed in the Court of the senior Subordinate Judge, the decree passed on its basis was perfectly legal (11).

**1111. Appeal :—**The proceedings for enforcement of an award under s. 15 of the old Arbitration Act were governed by s. 47, C. P. Code and an appeal was competent from an order rejecting such application. The fact of an objection being raised that award had been given without jurisdiction did not preclude the application of s. 47, C. P. C. (12).

**390. Interpretation of sections 391 and 393.—**In sections 391 and 393,—

(a) the expression “company” means any company liable to be wound up under this Act;

(b) the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods; and

(c) unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

This section embodies the provision in sub-s. (6) of s. 153 of the previous Act which applies both to s. 391 and s. 393—*Notes on Clauses*. See sub-s. (6) of s. 206 of the English Act of 1948.

See Note 1131 to the next section, under the heading “Company liable to be wound up”.

**391. Power to compromise or make arrangements with creditors and members.—**(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(9) *Kanhaiya Lal v. People's Bank of N. India* [1934] L. 49.

(10) *Kewal Krishan v. Punjab National Bank* [1934] Pesh. 107, 151 I.C. 860; *Grahams Trading Co. v. Chandulal* [1935] S. 228, 159 I.C. 824; *Peoples Bank of N. India v. Padam Lal* (supra); *Jhirighat Native Tea Co. v. B. Gupta* (supra).

(11) *Sitaram v. Punjab National Bank* (supra). But see *Jhirighat Native Tea Co. v. B. Gupta* (supra).

(12) *Kanhaiya Lal v. People's Bank of N. India* (supra).



(b) between a company and its members or any class of them;  
the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company.

(3) An order made by the Court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ten rupees for each copy in respect of which default is made.

(6) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(7) An appeal shall lie from any order made by a Court exercising original jurisdiction under this section to the Court empowered to hear appeals from the decisions of that Court, or if more than one Court is so empowered, to the Court of inferior jurisdiction.

The provisions of sub-sections (3) to (6) shall apply in relation to the appellate order and the appeal as they apply in relation to the original order and the application.

This section corresponds to s. 153 of the previous Act and s. 206 of the English Act of 1948. The slight amendment, *viz.*, that the words "and voting" might be added, which has been suggested by the C. L. C. at page 309 of their Report, has been embodied—*Notes on Clauses*.

The second para. of sub-s. (7) has been added by the Lok Sabha.

**1112. Application of section to banking companies and restriction :—**As to the application of this section to banking companies and restriction on compromise or arrangement between a banking company and its creditors, see the new s. 45 of the Indian Banking Companies Act, 1949.

There is no provision in the Banking Companies Act which permits cancellation of the arrangement on failure on the part of the company to make payments as they fall due under the scheme (13).

**1113. Jurisdiction of Indian Courts and Pakistan Courts :—**An application for sanctioning a scheme under this section in the High Court at Dacca in Pakistan in respect of a company having its registered office in India cannot be entertained by the High Court at Dacca which has no jurisdiction to pass any orders in the application (14). But where such a petition has previously been presented in the Court of the country where the company is registered, the Court in the other country has jurisdiction to pass orders of an ancillary nature (15). A proceeding under this section is not a proceeding in a winding up (15).

Ordinarily a scheme sanctioned by a High Court in India will not *per se* be binding on the creditors in Pakistan which is a foreign State and will be no defence to their action in the Pakistan Court (16). On the principle of international law and as a matter of convenience, however, the Courts in the two Dominions will co-operate with each other, and if an order of winding up or a scheme of arrangement is made by a Court in one Dominion, the Court in the other Dominion will adopt ancillary proceedings (16). In order to enable the Pakistan Court to treat a scheme sanctioned by the High Court in India as the main proceeding and adopt ancillary proceedings there, the scheme should be so framed as to be reasonable and fair to the creditors in Pakistan (16). If the Indian assets yield a larger percentage of payments to the Indian creditors than the Pakistan assets will yield to the Pakistan creditors it will not be fair to frame a scheme on the basis of the Indian assets alone and to distribute the assets amongst the Indian creditors to the exclusion of the Pakistan creditors, just as in the converse case the scheme will be unfair to the Indian creditors (16).

Notice of any scheme proposed in the Court of a particular country should go to all creditors, wherever they may be, so that they can, if they like, come in and participate in the distribution under the scheme, and for this purpose it is essential to lay before the Court all relevant information as to the company's entire assets and liabilities so as to enable the Court to judge whether the proposed scheme is a reasonable one (16).

Upon an application by a bank having its registered office in Calcutta, the High Court at Calcutta ordered meetings to be held for drawing up schemes of arrangement with the creditors under this section. The bank which had several branches doing business in Eastern Pakistan then presented an application to the Dacca High

(13) *United Bank of India v. Allamgar Tea & Trading Co.* [1955] N.U.C. 3642 (Ass.).

(14) *Girish Bank Ltd.*, *infra*.

(15) *Eastern Commercial Bank* [1949] 53 C.W.N. 1 D.R. 85 per Ormond J.

(16) *Indian Crescent Bank* [1948] 53 C.W.N. 183.

Court for necessary orders in respect of its creditors in East Bengal: *Held* (i) that the Indian Companies Act, 1913 was the law applicable to the case, (ii) that the meetings ordered to be held by the Calcutta High Court and any scheme of arrangement arrived at in those meetings, and eventually sanctioned by that Court would not bind any creditors of the bank in East Bengal (Dicey's Conflict of Laws, 3rd ed., p. 373 quoted); (iii) that in order to bind the assets of the bank in both jurisdictions, the scheme must be sanctioned by the Courts in both the Dominions [*Dane v. Mortgage Insurance Co.* (1894) 1 Q.B. 54 referred to]; (iv) that as the bank carried on business in East Bengal, the Dacca High Court had powers to make a winding-up order as ancillary to any winding-up order made by the Court within whose jurisdiction the registered office of the bank was situate [Palmer's Company Precedents (1921 ed.), Part II winding up, p. 18 referred to]; (v) that to protect the interest of creditors in East Bengal it was necessary for the Dacca High Court to make orders of a nature ancillary to the orders already made by the Calcutta High Court for holding meetings (17). In the last cited case meetings on the same day at the same hours at the same place under the same chairman as ordered by the Calcutta High Court were ordered and directions were given on the bank to ensure that the result of the meetings be reported by the chairman to the Dacca High Court, and the bank was restrained by injunction from disposing, except in the ordinary course of business, of any assets in East Bengal without the leave of the Dacca High Court.

A bank incorporated in British India had its registered office at Bannu in the North-West Frontier Province and also a branch office at Dehra Dun in the U. P. After 15th August, 1947 the bank became a company registered under the Act in its application to Pakistan. The bank was also registered in India under s. 277 of the old Act as a company established outside India. After partition of India in 1947 95 per cent. of its depositors and creditors migrated from Pakistan to India. The managing director of the bank shifted to Dehra Dun and started controlling its affairs from there. Subsequently an application under the present section was made to the Allahabad High Court on behalf of the bank. The question was whether that High Court had jurisdiction: *Held* (i) that after the partition of India the bank could not be considered as a company in its applicability to India and it was unregistered company as defined in s. 270 of the old Act and as such it was not a company as defined in s. 2 (1) (2) of that Act; (ii) that as the entire business of the bank was centralised at and was being controlled from Dehra Dun the bank had established its "residence" there and made it the principal place of business and therefore submitted to the jurisdiction of the Courts in the U. P.. The Allahabad High Court had therefore jurisdiction to entertain the application under this section (18).

An application under this section in the High Court at Dacca in Pakistan in respect of a company having its registered office in India can be entertained at Dacca which has jurisdiction under this section to pass orders on the application (19). Because a foreign company is liable to be wound up under the Act it would be an unregistered company within the meaning of ss. 582 to 584. The expression "Company" in s. 2 (1) (2) of the old Act included an unregistered company (18).

It has recently been held by a Full Bench of the East Punjab High Court (Harnam Singh J. *contra*) that a High Court in India has jurisdiction to sanction a scheme of arrangement in respect of a company whose registered office is in Pakistan and which has complied with the requirements of 592 *et seq. post*. In other words

- (17) *Girish Bank Ltd.* [1948] 52 C.W.N. 882—per Ormond J. in the Dacca High Court.  
 (18) *Mohan Lal v. Chawla Bank* [1949] A. 778. But see *contra* *Traders' Bank Ltd* [1949] L. 48, Pak. L.R. [1948] Lah. 209—per Cornelius J.  
 (19) *Noakhali Union Bank* [1950] 54 C.W.N. 201 (D.R.)—per Shabuddin J. But see *Traders' Bank Ltd.*, *supra*, judgment of a Pakistan High Court also.

s. 391 applies to such companies (20). In the last cited case *Khosla J. held* : sub-s. (6) of old s. 153 provided an exception to the provisions of s. 276 of the old Act and the general rule laid down in s. 276 was not absolute. Therefore, if a foreign company had complied with the requirements of s. 277 of the old Act and it was to be treated as an unregistered company for the purposes of Part IX of that Act, it was liable to be wound up within the meaning of sub-s. (6) of s. 153 of the old Act, and therefore, a scheme of arrangement could be sanctioned in respect of such a company. (Per Kapur, J. in the same case) for the purpose of winding up an "unregistered company" would be covered by the definition of "company" given in cl. (2) of sub-s. (1) of s. 2 of the old Act. Sub-s. (6) of s. 153 of that Act enlarged that definition and brought within its ambits all companies which could be wound up under the provisions of the Act, and which would include foreign companies. In this case *Harnam Singh, J. however held* : (1) S. 276 of the old Act rendered inapplicable to unregistered companies the whole except Parts IX and V of that Act; (2) provisions contained in s. 153 were not provisions with respect to the winding up of a company, and that being so, the application of s. 153 to a foreign company was excepted by s. 276; (3) the expression "liable to be wound up", in sub-s. (6) of s. 153 was not interchangeable with the expression "can be wound up", and the special definition of "company" given in s. 153 (6) rendered inapplicable the provisions of s. 153 which were not exposed to being wound up under s. 162 or s. 203 of the old Act; (4) a High Court in India not having jurisdiction in Pakistan had no jurisdiction to sanction a scheme of arrangement with respect to a company having its registered office in Pakistan. It has recently been held by the Calcutta High Court that where the applicant who had a Savings Bank account in Pakistan branch of a Calcutta Bank in respect of which the Calcutta High Court had sanctioned a scheme, but the Dacca High Court refusing to recognize the scheme had made a winding-up order in respect of the branch, applied to the Calcutta High Court for getting the benefit of the scheme, the applicant must participate in the winding-up proceedings of the Dacca High Court, and cannot get the benefit of the scheme sanctioned by the Calcutta High Court (21).

**1114. Construction** :—This section should be carefully construed. "It makes the majority of the creditors", as observed by Lord Justice Bowen, "or class of creditors, bind the minority, it exercises a most formidable compulsion upon dissentient creditors; and it therefore requires to be construed with care as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interest of the minority" (22). But in *English &c. Bank* (23) Vaughan Williams J. said : "I do not think that any one who has followed the subsequent decisions—whether under the Companies Acts or the Bankruptcy Acts—will hesitate to say that the tendency of late has been rather to favour the power of the majority of creditors to impose their will upon the minority and to construe the legislation upon the subject with some freedom."

**1115. Principle** :—The principle upon which this section is based has been laid down in a case (24) by Page, C. J. and Cunliffe, J. of the Rangoon High Court. It is true that as between a creditor and the company as his debtor, the creditor who proves insolvency is entitled *ex debito justitiae* to a winding up order. But the right *ex debito justitiae* is not his individual right, but his representative right. If the majority of the class are opposed to his view and consider that they have a better

(20) *Frontier Bank* [1950] 52 P.L.R. 349 (F.B.).

(21) *In re Dass Bank, Ltd.* [1954] C. 45.

(22) *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573.

(23) [1893] 3 Ch. 385 (386); see also *Katni Cement & Industrial Co.* [1937] B. 423.

(24) *Robson v. Dawson's Bank* [1932] R. 75, 10 Rang. 143.

chance of getting payment by abstaining from seizing the assets, then upon general grounds, the Court should give effect to such right as the majority of the class desire to exercise (24).

**1116. Court's powers & duties :—**Powers of the Court under the old section 153 were strictly limited. The Court might either sanction or refuse to sanction a scheme approved by the company and its creditors or members. The Court had no power upon an application to alter the scheme which had been sanctioned by the Court and agreed to at a meeting under that section without giving parties to an agreement an opportunity of considering the scheme in the way the Court proposed (25). Upon confirmation by the Court the scheme became by virtue of that section binding upon the creditors, shareholders and the company. Its terms could therefore be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders, and it was not possible for the company or its directors or shareholders, whether by resolution or ratification or otherwise, to alter the scheme. Nor was it possible for the company or its directors to vary the scheme under the guise of a compromise with a shareholder, as no variation or departure from that scheme could be validated by mere acquiescence of the shareholders or creditors (26). It was not the function of the Court to substitute its own scheme for the scheme presented to it for sanction, and if the Court was of opinion that unless some radical amendment was effected or the scheme was fundamentally altered, it ought not to be sanctioned, it was the duty of the Court to reject the scheme. "The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting *bona fide* and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and then see whether the scheme is a reasonable one, or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it" [per Lindley L.J. in *English Scottish &c. Bank* (1893) 3 Ch. 385]. The Court must be satisfied that the scheme is not only reasonable but also practicable. It is neither the duty nor the business of the members of the Court to express their own opinion as to whether, if they happened to be creditors of the bank, they could not or would not have voted in favour of the scheme. It is enough that the Court should hold that the view taken by the creditors as to the feasibility of the scheme is one to which persons acting honestly and viewing the scheme laid before them in the interests of those they represent take a view which can be reasonably taken by business men (27). The fact that the shareholders and creditors have approved of a scheme of compromise or arrangement does not mean that the Court is bound to accept the scheme. It is the duty of the Court to examine the proposals and decide whether they are fair and reasonable. That the shareholders and creditors have approved of a scheme will of course carry weight but there may be more important considerations (28). Where the resolution approving a scheme is shown to have been passed as a result of misleading statements contained in a letter written by one of the creditors of the company who was also a director thereof, and circulated to all the shareholders and creditors before the meeting, where the company was hopelessly insolvent and the scheme conferred no apparent benefit on any one and in fact ignored creditors who were not depositors and the scheme itself was not a feasible one, and where besides there were also allegations of unlawful and unautho-

(25) *Natore Kamala Bank* [1937] C. 124, [1937] 1 Cal. 368; *Mymensing Loan Office* [1937] C. 667.

(26) *Premila Devi v. Peoples Bank of N. India* [1938] P.C. 284 (288-89), 43 C.W.N. 205, 178 I.C. 659.

(27) *Per Page C. J. in Dawson v. Hormuji* [1932] R. 54, 10 Rang. 438. See also *Katni Cement & Industrial Co.* [1937] B. 423.

(28) *Calicut Bank v. Devani Ammal* [1940] M. 621, [1940] M.W.N. 252, 51 M.I.W. 699.

ried acts on the part of the company's officials, justice demanded that the resolution approving the scheme should be disregarded (29). Before sanctioning the scheme the Court may impose certain conditions upon the company for making some provision for the dissentients, if it is satisfied that the scheme is reasonable and fair and in the interest of the general body of shareholders. In any case under modern practice such a provision is not a *sine qua non* to sanctioning the scheme if it is reasonable (30).

A scheme is not effective unless it is sanctioned by the Court which in its turn cannot sanction the scheme until it has been accepted and approved by the three-fourths majority in terms of sub-s. (2) (31). Sub-s. (2) allows the decision of the majority to bind the minority and, therefore, it is incumbent on the Court to see that the decision does not act oppressively on the minority and that it is a reasonable and practicable scheme. The Court does not sanction a scheme merely because it has been approved by the requisite majority (31). In the last cited case it was held by both the trial Court and the appellate Court that the scheme was not a practicable scheme at all.

The first thing the Court has to see is whether the provisions of the statute have been complied with, secondly, the Court has to see that the persons present at the meetings have acted *bona fide* and that they have done nothing which in the circumstances is injurious to the interests of the classes whom they represented. But the Court does not sit merely to register the decree of the majority of the creditors and shareholders present at the meetings. It has to look at the arrangement and see that it is such that a man of business would reasonably approve, and further that it is fair and reasonable as regards the interests of all concerned (32). The Court cannot sanction a scheme which is neither *bona fide* nor *workable* (33). Thus where the majority of debenture-holders voted, not with a *bona fide* regard of the interest of all debenture-holders, but for the purpose of escaping their own liability as shareholders, the resolution could not have been passed *bona fide*, and the petition to obtain sanction of the Court was dismissed with costs (34).

"If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is their commercial advantage than the Court can be. While therefore I protest that we are not to register their decisions but to see that they have been properly convened and have been properly consulted and have considered the matter from a point of view, that is with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them" (35). Therefore it is very essential that the scheme must, as far as possible, be based upon correct information, but that does not mean that if the information is not accurate and complete the application for sanction should be rejected *in limine*. The Court can in such a case call for a report, in as short a time as possible, which will give a fair idea of the affairs of the company at the moment, and on that state of information the scheme as adumbrated or with the necessary amendments can be

(29) Ibid.

(30) Katni Cement & Industrial Co. (supra).

(31) Bengal Bank Ltd. v. Suresh Chakravarty [1951] 55 C.W.N. 206—per Harris C. J. & Banerjee J.

(32) Peoples Bank [1933] L. 51, 140 I.C. 128; see also Alabama & Ry. Co. [1891] 1 Ch. 213, per Lindley J.; Serajanj Loan Office v. Nilkanta [1935] C. 777, 39 C.W.N. 1199; India Flour Mills, Ltd. [1934] S. 54, 149 I.C. 51; Anglo-Continental Supply Co. [1922] 2 Ch. 723; Dorman, Long & Co. [1934] Ch. 634; Tata Iron & Steel Co. [1928] B. 80 (90), 30 Bom. L.R. 197, 108 I.C. 30.

(33) South Indian Mills Co. [1915] 30 I.C. 386.

(34) Wedgwood Coal & Iron Co. [1877] 37 L.T. 309.

(35) English Scottish & Australian Chartered Bank [1893] 3 Ch. 385, per Lindley L. J. at p. 409; see also Travancore National & Bank [1939] M. 318.

circulated with the report (36). As regards the capacity of creditors to safeguard their own interests in such cases the following observations of Vaughan Williams J. apply with greater force to this country : "I confess that I have very little belief in creditors of a company being able to look after their own interests. It is a matter of history that never mind what safeguards may be suggested, never mind what statutory precautions may be given, the creditors of an individual bankrupt have never been roused to look after their interest. Experience shows that creditors, whether of a company or of an individual man, never can be trusted to take care of themselves. The disjunct forces of individual creditors are a mere nothing as against the consolidated forces of those who are often deeply interested in bringing about an adoption of the scheme which is presented to the creditors" (37). In all concerns of the company, whether in the matter of winding up or in the matter of a scheme, the policy of the Act is to ascertain the wishes of the creditors as expressed by the majority of them subject to the rights of the minority being safeguarded. No Court is entitled to say that it will not ascertain the wishes of the majority in regard to a proposed scheme. It is true that under sub-s. (1) of this section a certain discretion is vested in the Court, but the scope of that discretion is limited, and the Court ought not to decline to order a meeting unless the proposals are illegal as being in contravention of the provisions of the Act or incapable of modification in view of ascertained facts, so that it would be a waste of time and expenditure to circulate them (38).

The Court cannot sanction an arrangement or compromise with the creditors of the company which necessarily involves the doing of an act which is *ultra vires* the creditor (in this case the Finance Corporation under the Industrial Finance Corporation Act, 1948) (39).

The responsibility of the Court in sanctioning a scheme under this section is all the greater where the creditors and shareholders attending the meeting and approving the scheme by the requisite majority are only a fraction of the general body of creditors and shareholders (40). The Court will reject a scheme under this section if it is satisfied that material facts were not placed before the meeting, whether intentionally or otherwise, or that the object of the scheme is to prevent an inquiry into matters that require investigation or that the scheme is not a practical and feasible one (40). Nor should the Court sanction a scheme which proceeds upon the assumption of honesty and efficiency of the management not justified by their past conduct, particularly in not complying with the provisions of the Act. For it is common experience that somehow or other the old management procure their return to power under the scheme (40). In the last cited case Mr. Justice Das refused sanction to the scheme and ordered the bank to be wound up compulsorily in the petition for winding up which was pending and was taken up for hearing along with the matter of sanctioning the scheme.

The Court should always prefer a living scheme to a compulsory liquidation bringing about the end of a company and usually without any hope of payment in full [*Dawson v. Hormusji*, (41)]. The onus of showing that any scheme is unreasonable is on the objectors (41). It is the Court's duty to scrutinize complicated schemes (42).

(36) Travancore National &c. Bank [1939] M. 318.

(37) English Scottish & Australian Chartered Bank [1893] 3 Ch. 385, per Vaughan Williams J. at p. 396.

(38) Travancore National &c. Bank [1939] M. 318.

(39) Vikram Cotton Mills v. Jwala Pd. Radha Krishna [1956] A. 14 relying on Oceanic Steam Navgn. Co. [1939] 1 Ch. 41.

(40) Calcutta Industrial Bank [1948] 52 C.W.N. 425.

(41) Per Cunliffe J. in *Dawson v. Hormusji* [1932] R. 54, 10 Rang. 428.

(42) Dorman Long & Co. [1934] Ch. 635.

**1117. Winding up :—**This section is applicable in the case of a going company as well as a company in liquidation, whereas s. 517 applies only in or in view of winding up of a company (43). Where after a petition has been presented under this section, an application for compulsory winding up is filed by certain creditors, there is no reason why the latter application should not be considered by the Court. In fact it should be considered at the earliest possible moment. Even if an order for winding up is passed, it will not interfere with any proper scheme being considered (44). "Schemes are presented to the creditors", said Vaughan Williams J. "in bankruptcy and in the liquidation of companies more often than not for the purpose of rectifying some wrong that has been done or for the purpose of serving some interest which is wholly antagonistic to the interests of the creditors (45).

The introduction of the word "in the case of a company which is being wound up, of the liquidator" in this section is intended to provide an additional and not an exclusive person who can make the application. If a company, or a member, or a creditor may make the application proposing a compromise or arrangement in the case of a company which is not under liquidation, there is no reason why any of them should not be competent to make the application in the case of a company which is being wound up (46). It has been held in the last cited case that if the tyranny of the majority over a helpless minority was the ground of the liquidation, the arrangement proposed did not afford a remedy for the evil. The consent of the legal representatives of the petitioner for winding up to the arrangement proposed did not affect its consideration except as showing the consent of another member to the said arrangement and it could not be said that the order asked for must be made as a matter of course (46). Where an application was made by the Official Liquidator for permission to convene a meeting for considering a proposal for reconstruction of the company, and a large sum of money belonging to the company was in Court and there were no subsisting liabilities, it was *held* that the Court was not justified in rejecting the application as if it were one for sanctioning a scheme. The fact that 74 out of 90 members opposed the scheme did not necessarily mean that none of them would change their views when all aspects of the question were discussed at the meeting. Even if the scheme was approved by majority, it could not come into force unless sanctioned by the Court who would have to consider all objections at the time of sanctioning the scheme (47).

The fact that s. 153 of the old Act was in Part IV and not in Part V of the previous Act did not do away with the responsibility of the Court in sanctioning a scheme, and there should be no relaxation of the principles laid down in English cases when a scheme was a part of winding up proceedings (48).

When a scheme is sanctioned by the winding up Court in the course of winding up, the Court may stay the winding-up except for the purpose of giving effect to the scheme. In such a case the Court may exercise the powers of the winding-up Court in matters arising under or out of the scheme as matters arising in winding-up (49).

Where a scheme is of the kind mentioned in s. 394 or 395 and is sanctioned even otherwise than in the course of winding up, even then the Court may by the

(43) *Katni Cement & Industrial Co. (infra)*; *Travancore National &c. Bank* [1939] M. 318.

(44) *Calicut Bank* [1939] M. 58, [1838] 2 M.L.J. 812.

(45) *English &c. Bank* [1893] 3 Ch. 385 (396).

(46) *Md. Abdulla v. Gopala* [1952] Tr.-Coch. 243 relying upon *In re, Travancore National & Quilon Bank* [1939] M. 318 (322).

(47) *Manakkil v. Joseph* [1953] Tr.-Coch. 357.

(48) *Calcutta Industrial Bank* [1948] 52 C.W.N. 425 per Das J. referring to *Pioneer Bank* (unreported) decided by him on 31st March, 1947.

(49) *Bhagwanti v. New Bank of India* [1950] E.P. 111 (F.B.).



order sanctioning the scheme or by any subsequent order make provision for all or any of the matters mentioned in these sections (49).

**1118. All reorganizations may be effected :—**All modes of reorganizing the share capital even when involving an interference with preference or other special rights attached to shares, can be effected as part of an arrangement with the members under this section (50), even though the scheme may involve winding up, though in the exercise of its discretion the Court may impose certain conditions upon the company before sanctioning the scheme (51).

**1119. Court's jurisdiction :—**The power given to the Court to sanction a scheme of arrangement between a company and its creditors or between the company and its members extends to debenture-holders and other creditors and enables the Court to sanction a scheme, although it deprives the debenture-holders of their security wholly or in part (52). The Court may also sanction an arrangement whereby terminable debentures or debenture bonds are converted into perpetual debenture stock (53).

The Court has a wide discretion in the matter (54), though it will reject the scheme only where it is shown that there has been something wrong ; but where the creditors acting in good faith and on sufficient information and with time to consider what they are about have pronounced that a particular scheme is to their commercial advantage, the Court will be slow to differ from them (55).

Where an application was made for the sanction of a scheme under which the liabilities of a company were to be paid up in full by a new company which was to take over the assets and liabilities of the old company, and the shareholders in the existing company were to receive shares of the new company as provided by the scheme, and meetings were held and the requisite resolutions of the different classes of shareholders and debenture-holders passed in favour of the scheme, it was held by the Court of Appeal that there was no jurisdiction under the section to compel the ordinary shareholders to take shares in the new company (56).

The Court sanctioning a scheme has jurisdiction to entertain an application for an order modifying the scheme so as to expunge from the scheme certain words preventing the decree-holders from executing their decrees (57).

**1120. Effect of amended s. 45 of the Banking Companies Act, 1949 :—**By reason of the amended s. 45 of the Banking Companies Act, 1949 the Court has been deprived of its jurisdiction to confirm a scheme or arrangement even though it has been sanctioned by the requisite majority, but has not been certified by the Reserve Bank (58). Where a scheme has been sanctioned under sub-s. (2) of the present section, but that scheme has not been certified as it is, but has been changed substantially by the Reserve Bank and that modified scheme is presented to the Court for confirmation, without being sanctioned as required by sub-s. (2) of the present section, the Court is not entitled to confirm it, because it has no jurisdiction to confirm such a scheme (58). But where the changes made by the Reserve Bank are nominal, this principle is not attracted (58).

(50) *Palace Hotel, Ltd.* [1912] 2 Ch. 438 ; *J. A. Nordberg Ltd.* [1915] 2 Ch. 439 ; *In re Schweppes, Ltd.* [1914] 1 Ch. 322 ; *Katni Cement & Industrial Co.* [1937] B. 423, 39 Bom. L.R. 675.

(51) *Katni Cement & Industrial Co.* (supra).

(52) *Alabama & Co. Ry. Co.* [1891] 1 Ch. 213 ; *Empire Mining Co.* [1890] 44 Ch. D. 422.

(53) *Re Shandon Hydropathic Co.* [1911] S.C. 1153.

(54) *English & Co. Bank* [1893] 3 Ch. 385, per Lindley L. J.

(55) *Ibid* and *Anglo Continental Supply Co.* [1922] 2 Ch. 723.

(56) *General Motor Cab Co.* [1913] 1 Ch. 377.

(57) *Dewangunge Bank & Industry Ltd.* [1935] C. 117, 38 C.W.N. 1171, 155 I.C. 811.

(58) *Bank of Bengal Ltd. v. Suresh Chakravarty* [1951] 55 C.W.N. 206.

A scheme according to which bank B undertakes to pay the deposits of bank A and against this Bank A is to hand over to bank B its assets, is not *ultra vires* of the bank A and is not illegal (59). Even if the power to do this is not vested in the directors, it is an act capable of being ratified and approved by the shareholders, and therefore no objection can be taken to it (59).

Where in the case of a bank its affairs were to be managed under a scheme by the directors appointed by the creditors, but the old management continued to interfere with the working by the new directors, it was held: (1) these facts alone constituted a sufficient ground for ordering winding up of the bank on just and equitable ground under cl. (f) of s. 433; (2) the fact that the creditors' approval for the scheme was obtained by presenting a greatly over-optimistic and false picture of the bank's financial position was also such a ground (60).

**1121. Schemes Court may sanction :—**Under this section any kind of compromise or arrangement may be sanctioned by the Court (61). The Court may sanction schemes containing the following provisions: The shares in the company shall be sub-divided and that each shareholder shall surrender some of the shares resulting from the sub-division to another company whose undertaking is to be merged in that of the company whose shares they hold; that the first mortgage debenture holders are to be postponed to other debentures or charges about to be issued or created; that in place of debentures guaranteed by a third party, debentures without a guarantee are to be issued to the holders and the guarantor released; that debenture holders and other creditors are to accept in satisfaction of their debts shares in a company to be formed; that debentures, the interest on which is to be payable out of the profits of the company, are to be taken in satisfaction of debentures the interest on which is payable whether profits are made or not; that debentures repayable at periods of from three to five years shall be converted into debenture stock repayable only in a certain limited number of events (62). In Scotland a scheme has been sanctioned which involved an alteration in the memorandum of association in order to clarify the rights of the several classes of share-holders, these rights not being clearly stated in the memorandum (63). Arrangements may be entered into for the purpose of reconstructing a company, staying any pending winding up proceedings or distributing assets amongst creditors. They may also involve reduction of capital, but if so, the proceedings must comply with the requirements of the Act applicable to such cases (64). A scheme of arrangement may be sanctioned under which the undertaking of the company is to be transferred to a new company and members of the company are to receive fully paid or partly paid shares in the new company in the proportions specified in the scheme. In such a case the Court usually requires as a condition of its sanction, provisions to be made for dissentient members to have the same rights as they would have enjoyed if the sale had been effected under s. 234 of the English Act of 1929 (corresponding to s. 494 of the present Act); and where the scheme involves a sale of the undertaking of the company to a new company in the manner contemplated by that section, the provisions of that section must be complied with (64).

**1122. Foreign company :—**In the case of a foreign company having its central office in India the High Court, in whose jurisdiction such office is situate, can entertain an application under this section at the instance of a creditor or members of such a foreign company. When once an application for winding up

(59) *Kirpa Ram v. Shriyans Prasad* [1951] Punj. 79, 53 P.L.R. 469.

(60) *Jailal v. Simla Banking & Industrial Co.* [1955] N.U.C. 4983 (Punj.)

(61) *Barclay's Bank* [1918] 62 S.J. 752; see also *Oldham Press Ltd.* [1925] W.N. 10.

(62) See Hals. (Hailsh. ed. 1932), pp. 795-96 and the cases collected there.

(63) *Ibid.*, pp. 796-97 and the cases collected there.

(64) *Ibid.*, pp. 796-97 and the cases collected there.

a foreign company is made in an Indian Court, the expression "Court" in this section must mean the Court in which the company is being wound up and therefore such Court will have jurisdiction to entertain an application under this section even before an order for winding up is passed by such Court. In such a case the right to apply under this section is not restricted only to a liquidator (65). As to the mode of proceeding in such a case see the last cited authority. Where the contract of deposit of money with a bank was made by the offer of the depositor, a resident in India, in the opening form, and the acceptance by the bank (which was incorporated in and according to the law of the State of Travancore having its head and only office in that State) by the issue of the deposit receipt, and it was not only made in Travancore but also to be performed there, the order of the Court in that State making the scheme of arrangement binding on all the creditors, wherever situate, governed the transaction and the bank was protected by the terms of the scheme of arrangement (66).

**1123. "Compromise" and "arrangement" :—**A power to compromise rights presupposes some dispute about them or difficulty in enforcing them (67). A proposed scheme for amalgamation of two companies, though not a compromise, may be an arrangement within this section, and there is no ground for limiting the meaning of the word to the question of some dispute or difficulty to be resolved by a compromise or arrangement (68). "A reasonable compromise must be", observed Lord Justice Bowen, "a compromise which can by reasonable people conversant with the subject be regarded as beneficial to those on both sides who are making it. I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such" (69).

A compromise, to be effective, must be sanctioned by the Court (70).

The word "arrangement" as used in this section means something analogous in some sense to a compromise. In any arrangement which can fairly be called a compromise or considered as analogous to a compromise there must be both give and take (65). Where the directors are authorized to manage the company, a proposal made by them under this section in the name of the company is valid and proper (71).

A meeting of the company is not a condition precedent to proposal under this section and the directors can initiate such proposals (72). The company need not take proceedings to alter the memorandum and the articles before the Court can sanction such an alteration (73).

The reconstruction of an existing company by winding up and sale of its entire undertaking and assets for shares in a new foreign company, though outside the scope of a reconstruction may be effected as an arrangement under this section (74).

(65) Travancore National &c. Bank [1939] M. 318.

(66) State Aided Bank of Travancore v. Dhrit Ram [1941] 69 I.A. 1, 44 Bom. L.R. 557 (P.C.).

(67) Mercantile Investment Co. v. International Co. [1893] 1 Ch. 484 n.; 68 L.T. 603 n.; Mercantile Investment Co. v. River Plate &c. Co. [1894] 1 Ch. 578.

(68) Guardian Assurance Co. [1917] 1 Ch. 431.

(69) Alabama &c. Ry. Co. (supra).

(70) Traders' Bank Ltd. [1948] L. 48.

(71) India Flour Mills Ltd. [1934] S. 54, 149 I.C. 51; General Motor Cab Co. [1913] 1 Ch. 377.

(72) Tata Iron & Steel Co. [1928] B. 80, 30 Bom. L.R. 197; Bruce Peebles & Co. v. Baine & Co. [1918] S.C. 781.

(73) Tata Iron & Steel Co. (supra); Palace Hotel Ltd. [1912] 2 Ch. 438; Scheweppees Ltd. [1914] 1 Ch. 322; J. A. Nordberg Ltd. [1915] 2 Ch. 439.

(74) Anglo-Continental Supply Co. [1922] 2 Ch. 723; see also Canning Jarrah Timber Co. [1900] 1 Ch. 708; Tea Corporation [1904] 1 Ch. 12; Sandwell Park Colliery Co. [1914] 1 Ch. 589.

In the last noted case the Court's jurisdiction and duty under the section were explained by Astbury J.

If a proper provision is made for dissentient members, reconstruction of an existing company by winding up and sale of the entire assets for shares in a new company may be effected under this section (75).

A mere agreement on the part of the shareholders is not enough for the acceptance of a scheme. It is ultimately for the Court to sanction it or not. It is no doubt open to a party to withdraw his offer before the scheme is put before the shareholders and sanctioned by the Court, but he may be estopped by his action or conduct (76).

Under ss. 153 and 154 of the English Act of 1929, corresponding to this section and s. 394, Bennet J. sanctioned a scheme of arrangement by which the company was allowed by its directors and liquidators to enter into an agreement with another company for adoption of the scheme by the latter and for transfer of the business and assets of the company to the other company (77).

**1124. What the Court considers in sanctioning a scheme :—**The *procedure* is to apply to the Court by summons in the first instance to direct meetings of the different classes of the creditors and contributories and take directions from the Court (78). After the proposed scheme has been passed by the requisite majority, a petition is presented to the Court for sanctioning the scheme (78).

Rules 40 to 47, App. VII of the O. S. Rules of the Calcutta High Court provided that the petition for confirmation should clearly show the compromise and arrangement, recite the order for the meetings, the result thereof and the necessity for the compromise or arrangement. All proper materials should be placed before the Court to show that the scheme or arrangement was one which would be acceptable by an ordinary prudent and reasonable man of business (79).

The sanction of the majority as required by s. 153 (2) of the old Act was a pre-requisite for confirmation of the scheme. The Court does not sanction a scheme merely because it has been approved by the requisite majority, nor because the majority are acting *bona fide*. But at the same time the Court would be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme (79). This section allows the decision of the majority to bind the minority. Therefore it is incumbent on the Court to see that that decision does not act oppressively on the minority. The Court must see that the scheme is reasonable and practicable (79).

If an act is not *ultra vires* of the company, and it is capable of being ratified or approved of by the company, it is not open to a minority of shareholders to object to any transaction, unless it is fraud or the majority have abused their powers and are depriving the minority of their rights (80).

In exercising the power under this section the Court will consider whether the class summoned to a meeting was fairly represented by those who attended and whether the statutory majority that approved the scheme acted *bona fide* or were seeking to promote interests adverse to those of the class whom they professed to represent (81).

(75) Sandwell Park Colliery Co. (supra).

(76) Union Indian Sugar Mills Co. [1930] A.L.J. 385, [1930] A. 330.

(77) Star Tea Co. [1930] W.N. 4.

(78) Alabama &c. Co. (infra); Slater v. Darlaston &c. Co. [1877] W.N. 139, 165.

(79) Bengal Bank Ltd. v. Suresh [1952] C. 133.

(80) Kirpa Ram v. Shrivans Prasad [1951] Punj. 79, 53 P.L.R. 460.

(81) Alabama &c. Co. [1891] 1 Ch. 213.

In exercising its power of sanction the Court will also see that the provisions of the statute have been complied with (82). The Court will see that the majority are acting *bona fide* and then only it will give effect to the decision of the meeting (83), but at the same time, the Court will be slow to differ from the meeting, unless either the class has not been properly consulted or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some defect is found in the scheme (84).

The Court will go into the whole matter carefully and find out (i) whether all the provisions of law and the directions of the Court itself in so far as they relate to the holding of the meeting, the conduct of its proceedings and the record of the majority votes etc. have been fully complied with, and (ii) whether the scheme is in the interest of the company as well as in that of the creditors and should be given effect to (84). Where the Court is satisfied that the meetings were properly held and the provisions of the law and the directions of the Court have been complied with, the Court is not justified in going into the reasons which led the creditors who were present at the meeting to agree under the scheme to give up a part of their debts (85).

Before granting leave to convene meetings under this section the Court must be satisfied that the proposed scheme is reasonable and capable of being implemented by the company (86). In sanctioning a scheme approved by the requisite majority of creditors the Court has also to consider whether according to its sanction the scheme will be conducive to public interest and commercial morality (87). Even where a scheme is approved by the statutory majority, and notwithstanding favourable report by the auditor appointed by the Court, the Court will not sanction the scheme if the management are found to have been guilty of misconduct in relation to the affairs of the company (87).

When the scheme contemplated the formation of a new company to take over the assets of the liquidating company and shareholders in the old company are allowed to take shares, not fully paid up, in the new company in respect of shares as to which they are liable in the winding up, the Court may, as a condition of sanctioning the scheme, require the insertion, in the memorandum of association of the new company, of a clause preventing them from escaping liability by transferring their new shares (88).

In sanctioning a scheme to alter the memorandum of association under the section, the Court will also see that the minority is not being over-ridden by a majority having interest of their own clashing with those of the minority whom they seek to coerce. Further, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interest of those whom they represent, take a view which can be reasonably taken by business men (89).

It is usual for the scheme of arrangement between a company and its creditors to contain a provision empowering some one, be he a liquidator or some other officer of the company, to assent to any such modification as the Court may think fit to impose. In the absence of any such person, it is not open to the Court *suo motu* to impose on a creditor any condition which will operate by way of modification of the scheme, especially in the absence of the consent of the persons who have entered

(82) *Neath v. Brecon Ry.* [1892] 1 Ch. 349.

(83) *English, Scottish & Australian Bank* [1893] 3 Ch. 385, 398, 409.

(84) *Ibid* at p. 409; *London Chartered Bank of Australia* [1893] 3 Ch. 540, 545.

(85) *Lakshmi Commercial Bank* [1948] East Punjab 38 (C.N. 16), 50 P.L.R. 123.

(86) *Indian Crescent Bank* [1948] 53 C.W.N. 183.

(87) *Bharati Central Bank* [1949] 53 C.W.N. 238.

(88) *London Chartered Bank of Australia* (supra).

(89) *Tata Iron & Steel Co.* (supra); *Alabama & C. Co.* (supra).

into the arrangement (90). In the last cited case the creditors were unrepresented before the Court and could not give their assent to the modification; so Costello and Lort Williams JJ. set aside the order of Ameer Ali J.

**1125. Where the Court will not give sanction :—**As a general rule the Court would not sanction an arrangement if it would prejudice a creditor whose rights would have been preferential if the winding up petition had been carried on (91); nor would it sanction an arrangement which did not provide that the new company should undertake to obey the order of the Court as to any proceedings which the Court might think it right to have taken against officers of the old company (92). A Court will not give sanction to a scheme which will have the effect of enabling a bank or other company which is to all intents and purposes, insolvent, to continue to attract deposits which in all probability will go the way of the former deposits (93). The Court will not also sanction a scheme of arrangement whereby the company proposes to convert issued preference shares into redeemable preference shares (94).

A scheme of arrangement was roughly this: First mortgage debentures secured on the assets of the company should be issued to all the creditors to the extent of their dues, the debentures to carry interest at 6 per cent. tax-free from the date of issue. The company should pay the debenture-holders every year commencing from the third year of the working of the factory at the rate of 20 per cent. of the debenture amounts and the interest due on the entire debentures, and the company should have the option to repay the debentures even earlier. It was held that the proposed scheme was neither reasonable nor beneficial to the company and hence could not be approved by the Court (95).

**1126. Scheme sanctioned differs from agreement :—**A scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme. So when the debt of one of joint and several debtors, being a company, is released by a scheme of arrangement in the liquidation of the company, the scheme does not release the other debtors (96).

**1127. Creditors :—**For the purpose of an application under this section the creditors whose names appear on the books of the company should be considered as creditors and their votes should be taken into account. Creditors whose names do not appear in the books have to show to the satisfaction of the Court that they are creditors (97).

**1128. Voting by creditors :—**Every person having a pecuniary claim against a company, whether actual or contingent, is a creditor within this section (98); but holders of debentures payable to bearer are not entitled to vote unless they produce their debentures at or before the meeting (99).

Creditors casting their votes at a meeting of creditors under this section for or against a scheme of arrangement are entitled to have the result of the poll recorded (1). Where certain scrutineers were appointed by the Court to assist the chairman under order of the Court, the decision of the chairman as to the admissibility of any proxy was held to be final subject to the Court's order of revision (1). The scruti-

(90) *Mihirendra v. Brahmanberia Loan Co.* [1934] C. 816, 61 Cal. 1047.

(91) *Richards & Co.* [1879] 11 Ch. D. 676.

(92) *Practice Notes* [1894] W.N. 166.

(93) *Nilphamari Luxmi Bank* [1936] 63 Cal. 99.

(94) *St. James' Court Estate, Ltd.* [1943] 112 L.J. Ch. 193.

(95) *Vishweshwaradass v. Southern Metals & Alloys Ltd.* [1955] N.U.C. 3208 (Mad.).

(96) *Garner's Motor, Ltd.* [1937] 1 Ch. 594.

(97) *Mahaluxmi Cotton Mills* [1950] C. 399, 54 C.W.N. 70.

(98) *Craig's Claim* [1895] 1 Ch. 267.

(99) *Wedgwood Coal & Iron Co.* [1877] 6 Ch. D. 627.

neers have no *locus standie* to file a petition for direction as to the validity of proxies used at the meeting, and the Court ought not to exercise its powers of revision unless and until the chairman has given his decision as to the admissibility of the proxies (1).

The proper mode of ascertaining the wishes of the creditors is to take into account the value of each debt (2).

**1129. Notice and advertisements :—**When the Court is exercising jurisdiction under this section, certain principles must be kept in view before sanction to a scheme is accorded. The regularity of the meeting directed by the Court to be held would be a very important point for the Court to consider. This would include the question of service of notice of the meeting and questions relating to the conduct of the meeting (3). But the sanction does not make it obligatory upon the Court or the company to serve the notice on each and every creditor of the company, and a decision arrived at by the creditors and the company in the absence of any individual creditor is not therefore invalid (4). Through an oversight on the part of the solicitors none of the advertisements were inserted in the newspapers. It was proved that out of 31 shareholders 30 received the notices and of the 140,000 ordinary shares, 139,400 were accounted for at the meeting, and of the 200,000 deferred shares 199,275 were accounted for : *held* by Romer J. that the meetings had been in substance (though not precisely) summoned in the manner prescribed (5). The object of the order was to secure that every shareholder received notice of the meetings, and in this case it appeared that the notices had reached all the shareholders with one exception. Under the circumstances the matter was pursued without the serious trouble of convening further meetings (5).

**1130. Notice to creditors in Pakistan :—**A scheme which purports to bind the creditors in general, but of which no notice is served on Pakistan creditors, can not be sanctioned by the Court (6). "In all proceedings in any Court in India the Pakistan creditors would be bound and the scheme would be a good defence in such proceedings" (7).

**1131. Any company liable to be wound up :** In s. 390 it is provided that the expression "company" means any company liable to be wound up under the Act. An unregistered company is liable to be wound up under s. 583 (8). But see the under-noted case (9) where it has been held that the expression "any company liable to be wound up" in this section has a restrictive effect, inasmuch as it confines the application of the section to companies whose condition is such that they are exposed to winding up. The expression does not embrace every company, whatever its nature, for the winding up of which provision is contained in the Act, thus embracing unregistered companies whether exposed to winding up or not. By virtue of the special definition contained in s. 589, the present section would have no application to an unregistered company unless an order for winding up of such unregistered company is in the process of being made. The provisions of the present section are available in respect of unregistered companies even at a stage prior to the actual making of a winding up order (9).

(1) *Dawson v. Hornusji* [1932] R. 96, 10 Rang. 189.

(2) *Mahaluxmi Cotton Mills* [1949] 54 C.W.N. 80.

(3) *Mahiganj Loan Office v. Behari Lal* [1937] C. 507.

(4) *Bhagat Ram v. Angels Insurance Co.* [1937] L. 442, 39 P.L.R. 230.

(5) *Anglo-Spanish Tarter Refineries, Ltd.* [1924] W.N. 22.

(6) *Bank of Bengal Ltd. v. Suresh Chakravarty* [1951] 55 C.W.N. 206—per Bachwat, J.

(7) *Ibid* at p. 210.

(8) *Mohan Lal v. Chawla Bank, Ltd.* [1949] A. 778.

(9) *Traders' Bank Ltd.* [1949] L. 48, Pak. L.R. [1948] Lah. 209—per Cornelius J. dissenting from Travancore N. & Q. Bank [1939] M. 318, 183 I.C. 353 and following *Rudow v. Great Britain M.L.A. Society* [1881] 17 Ch. D. 600, 44 L.T. 688.

**1132. Majority of three-fourths :—**If the votes cast be a multiple of three or some such number, will the fraction be taken into computation? It appears that the maxim *de minimis non curat lex* is not applicable to such a case and the fraction must be taken into account in computing the majority. In construing a trust deed which required a majority of three-fourths for passing a certain resolution the Bombay High Court has held that the above maxim is applicable only to the computation of time in which the law neglects a fraction and that in computing the majority of votes a fraction cannot be disregarded (10). The nominal value of policies of an insurance company must be accepted as the value of the policies for the purposes of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise under this section (11).

If a person is a member of more than one class, he may attend and vote at meetings of each class of which he is a member. The scheme need not be approved by a majority in value of all the creditors or members provided that the requisite majority of those present in person or by proxy sanction it (12).

**1133. Proxy :—**This section gives a general right to vote by proxy, using any proper form of proxy, and the proxies need not be sent to the company's office before the meeting (13). The Court has ample power under this section to settle a form of proxy: substantial failure to comply with the Court's direction would invalidate the proxy (14). Where meetings of three classes of debenture-holders were ordered to be held to consider and vote on a scheme of arrangement under s. 153 of the English Act of 1929, it was held that the debenture-holders were entitled under r. 150 of the Companies (Winding up) Rules, 1929 to appoint the Official Receiver their proxy at the meetings (15). In the last cited case the Court's order was made while the society was being wound up by order of the Court. But see the under-noted case where it has been held that at a meeting of creditors only creditors are entitled to be present. Persons who have proxy from creditors, but who are not themselves creditors, cannot attend the meetings (15). In the last cited case the Court's order was made while the society was being wound up by order of the Court. But see the under-noted case where it has been held that at a meeting of creditors only creditors are entitled to be present. Persons who have proxy from creditors, but who are not themselves creditors, cannot attend the meeting (16). Directors, who, pursuant to the Court's order, receive proxies for or against a scheme, must use them (13). As to the form of proxy, the form given in reg. 67 of Table A of the old Act might be a useful guide and definite direction from the Court may be taken (17). Where the company was being wound up, the provisions in the rules made by the High Courts under s. 246 of the old Act might be followed (18).

"At a meeting of creditors a resolution is deemed to be passed when a majority in number and value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution. Voting is usually by show of

(10) *Lakhmidas & Co. v. Sir Dorab* [1927] B. 195 (198), 51 Bom. 247, 29 Bom. L.R. 19, 101 I.C. 229.

(11) *Light of Asia Insurance Co.* [1941] 45 C.W.N. 979.

(12) *Madras Irrigation Co.* [1881] W.N. 120.

(13) *Dorman, Long & Co.* [1934] Ch. 635.

(14) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197, 108 I.C. 465 following *Inter Oceanic Ry. Co.* [1893] 3 Mans. 102, and *English, Scottish & C. Bank* [1893] 3 Ch. 385.

(15) *General Mortgage Society* [1942] Ch. 274.

(16) *Mahaluxmi Cotton Mills* [1949] 54 C.W.N. 80.

(17) As is done in England, see *Magadi Soda Co.* [1925] 41 T.L.R. 297. See Schedule IX of the present Act.

(18) See *Central-Bahia Ry. Co.* [1902] 18 T.L.R. 503 and *Madras Irrigation Canal Co.* [1881] W.N. 120 where it was held that for the purposes of a meeting of any particular class proxies can only be given to members of that class.



hands, but should the exact votes of the creditors be required, those represented by proxy must be calculated" (19).

**1134. Demand of poll at a creditors' meeting :—**In a meeting of creditors under this section it is not necessary to demand a poll for the purpose of counting the proxies for ascertaining whether the scheme has been approved of by the statutory majority (20).

**1135. Class meetings :—**Meeting of each class of creditors or shareholders must be held separately, each class being confined to those persons whose rights are not dissimilar to make it impossible for them to consult together with a view to their common interest (21). The presence of shareholders of another class is however a matter relating to the conduct of the meeting which lies in the hands of the chairman with the assent of those persons who are properly present and constitute the meeting, and where no objection is taken at the meeting, those present must be taken to have assented to the meeting being so conducted, and the resolution passed thereat will accordingly be valid (22).

At a meeting held under this section the written acceptance of the arrangement by those shareholders and creditors who are not present, either in person or by proxy, cannot be taken into consideration to make up the requisite majority (23).

If in a company different amounts are paid on shares or some shareholders have paid amounts in advance of calls, this makes various classes of shareholders and separate meetings must be called (24).

In *Sovereign Life Assurance Co. v. Dodd* (25) it was held that insured persons whose policies had matured formed a distinct class of shareholders from those whose policies had not matured. In that case Lord Esher, M. R. said : "They must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and therefore if we find a different state of facts existing among different creditors which may differently affect their minds and the judgment, they must be divided into different classes. In the present case the persons who had notice of the meeting were policy-holders, that is to say, policy-holders whose policies had to be dealt with. But the defendant was not a policy-holder at all, his policies had been fulfilled, and was a creditor for the amount of his policies and could have sued the company for money due; he had a vested cause of action, the policy-holders had none; and it is obvious that he could not consider the matter with the same mind and the same point of view as the policy-holders who were summoned to the meeting." In the same case Bowen L. J. at p. 583 observed : "It seems plain that we must give such a meaning to the term 'class', as will prevent the section being so worked as to result in confiscation and injustice and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

**1136. Binding nature of scheme :—**As long as a scheme sanctioned is carried out by the company by regular payment in terms of the scheme, a creditor who is bound by the scheme may not ordinarily be entitled to maintain a winding-up petition founded only on the company's inability to pay its debts at once. But if

(19) Shackleton's Law & Practice of Meetings, 2nd ed., p. 308.

(20) Bengal Bank Ltd. v. Suresh Chakravarty [1951] 55 C.W.N. 206—per Bachwat, J.

(21) Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, 583 per Bowen L. J.

(22) Carruth v. Imperial Chemical Industries [1937] A.C. 707 per Lord Maugham & Lord Russel of Killowen.

(23) Kashmiri Bank v. Rai Gokul Chand [1917] 40 I.C. 57.

(24) United Protection Assurance Co. [1910] 2 Ch. 477.

(25) [1892] 2 Q.B. 573 quoted by Lord-Williams J. in Jalpaiguri Banking & Trading Corp'n. [1937] C. 401, 172 I.C. 717.

the company makes default in payment of an instalment under the scheme on its due date, there is a debt presently due by the company, and there is no reason why such a debt, if it is more than Rs. 500 [as provided in s. 434] will not entitle a creditor to present a winding-up petition on any of the grounds mentioned in the several clauses of s. 433 including the "just and equitable clause (f)" (26). The scheme does not create a new debt, but simply makes the original debt payable in the manner and to the extent prescribed by the scheme. Where the original application for winding-up had not been dismissed, but only adjourned *sine die*, the petitioning creditor has not to rely upon what may be called a new cause of action (26).

A creditor bound by a scheme under this section may not be entitled to present a winding-up petition on the ground that the company is unable to pay its debts or has failed to pay after the statutory notice under s. 434. But he may do so on the ground of default in filing the statutory report or in holding the statutory meeting or on any ground which the Court may consider just and equitable (27).

The arrangement being founded on an agreement, any revision of this agreement under s. 153 of the previous Act was possible only by again going through the procedure provided by that section. Failure on the part of the company to make payments as they fell due under the scheme did not entitle any creditor to demand cancellation of the scheme or of the order sanctioning it (28). All those who had rights under the scheme could enforce their rights by suitable processes. A breach of the condition of the scheme did not result in its cancellation (28).

Where a scheme does not expressly fix any time within which the creditors are to be paid, the scheme cannot go on for ever and the law would imply that payment would be made within a reasonable time (27). Lapse of 13 years from the date of the sanction of the scheme was held to be more than a reasonable time within which payment should have been made, and so there had been a breach of the terms of the scheme (27). In the last cited case an order was made for winding up the company on the "just and equitable" ground mentioned in cl. (f) of s. 433.

**1137. Stay of proceeding :—**A person who has entrusted certain specified goods (shares) to the custody of a company merely for the purpose of custody and which has never become a part of the assets of the company is not a creditor who can come in a proceeding under this section (29). Therefore where an order has been obtained under sub-section (6) for stay of all proceedings against the company, a criminal proceeding under ss. 403, 406 and 409/414 I. P. C. brought against some of the managing directors of the company is not stayed under this sub-section (29). An application under this section raises questions only between a company and its creditors and members. If the proceedings before the Magistrate were in respect of a criminal breach of trust, the complainant, not being a creditor of the bank in respect of the aforesaid shares, those proceedings were outside the stay order. But if during the trial it was found that the case was not one of criminal breach of trust, but a case of fraudulent operation of banking account, the case would fall within the ambit of the stay order and should then be stayed. The Magistrate could therefore proceed with the case till he could decide these points. In the last cited case (30). Mr. Justice Chakravarti observed : "I am of opinion that the opposite party (complainant) could not, as a person entitled to such damages (unliquidated damages in tort) expect to be accepted as a creditor of the bank in the proceeding under the Companies Act."

Where in pursuance of an order passed by the Company Judge that there should be a stay of all proceedings against the company till the disposal of the

(26) Darjeeling Bank [1948] 52 C.W.N. 414.

(27) Noakhali Loan Co. [1947] 51 C.W.N. 791—per Das J.

(28) United Bank of India v. Allambag Tea & Trading Co. (1955) N.U.C. 3642 (Ass.).

(29) Chittaranjan v. M. Ameen [1948] 52 C.W.N. 708, [1948] C. 242, 49 Cr. L.J. 397.

(30) Ibid at p. 712.

application for sanction of the scheme of amalgamation, criminal proceedings pending against the manager of the company's branch are stayed, the proceedings would be revived as soon as the stay order has spent its force by reason of the disposal of the application for sanction of the scheme. The complainant need not obtain an order for vacating the stay order (31).

The order staying commencement and continuation of all suits and proceedings until final disposal of the petition for scheme continues to be in force when the final order sanctioning the scheme is passed. It is vacated only if the scheme is refused. On the scheme being sanctioned it is not necessary to pass a formal order making the rule of stay absolute (32). Such a stay order affects both secured and unsecured creditors of the company (32). After the scheme is sanctioned, if the judgment-debtor company wishes to pay earlier than the prescribed dates, it is not prevented from doing so. Such payments cannot be regarded as a waiver of privileges granted in the scheme (32).

**1138. "Company liable to be wound up"** :—Sub-section (6) of the old s. 153 provided an exception to the provisions of s. 276 of the old Act, and the general rule laid down in s. 276 was not absolute. Therefore, if a foreign company had complied with the requirements of s. 277 of the old Act and was to be treated as an unregistered company for the purpose of Part IX of that Act, it was a company liable to be wound up within the meaning of the sub-section, and therefore a scheme of arrangement could be sanctioned in respect of such a company (33). Now see s. 390, cl. (a).

**1139. Different classes of creditors** :—In the Calcutta High Court there was a conflict of decisions on the question whether unsecured creditors, e.g., depositors who had already obtained a decree, belonged to a class different from that of those who had not obtained a decree for their money. In one set of cases it was held that the decree-holders belonged to a different class and as such were not bound by the scheme when a separate meeting of their class was not held (34); while in another set of cases it was held that they did not belong to a different class (35). The question was however set at rest by the amended sub-s. (6) of the previous Act which said that for the purposes of this section unsecured creditors who might have filed suits or obtained decrees should be deemed to be of the same class as other unsecured creditors. The amendment made in that section by the Companies (Amendment) Act, 1936 purported to explain the meaning of the particular expression "creditors

(31) *Susil Chandra v. Krishna Chandra* [1949] C. 689.

(32) *Allambag Tea & Trading Co. v. United Bank of India* [1953] Ass. 107. [1952] 4 Ass. 189.

(33) *Frontier Bank Ltd.* [1951] Simla 145 (F.B.). 52 P.L.R. 349—per Khosla & Kapur JJ., Harman Singh J. *contra*; *Frontier Bank* [1951] Simla 145 (F.B.) (Harman Singh, J. *contra*).

(34) *Manikganj Trading & Banking Co. v. Madhabendra* [1936] C. 162, 40 C.W.N. 580; *Noakhali Loan Co. v. Hemendra* [1936] C. 402; *Dewanganj Bank & Industry Ltd.* [1935] C. 117, 38 C.W.N. 1171, 155 I.C. 811; *Sushila Bala v. Anjuman Trading Co.* [1935] C. 398, 156 I.C. 590; *Melanda Loan Office* [1935] 39 C.W.N. 690; *Rajshahi Banking Corpn. v. Surabala* [1936] 40 C.W.N. 1104; *Sudhanya Kumar v. Faridpur Loan Office* [1937] C. 169, 171 I.C. 492; *Krishna Nath v. Dinajpur Loan Office* [1938] 2 Cal. 30, [1938] C. 337 per B. K. Mukherjea J.; *Rajshahi Banking & Trading Corpn. v. Pulin Bihari* [1938] 42 C.W.N. 610; *Mahiganj Loan Office v. Behari Lal* [1937] C. 507.

(35) *Barisal Loan Office v. Sasthi Charan* [1936] C. 282, 39 C.W.N. 1198; *Seraiganj Loan Office v. Nilkanta* [1935] C. 777, 39 C.W.N. 1199, 62 C.L.J. 310; *Nator Kamala Bank* [1937] C. 124, [1937] 1 Cal. 368; *Jalpaiguri Banking & Trading Co.* [1935] 39 C.W.N. 875, [1937] C. 401; *Badarganj Loan Office v. Shaharuddin* [1937] 41 C.W.N. 1272. See also *Bhagat Ram v. Angels Insurance Co.* [1937] L. 442, 39 P.L.R. 230.

of the same class' and as such the amending Act must have relation back to the date when the original Act VII of 1913 was passed (36). See now s. 390 (c).

Creditors and policy-holders of an insurance company are two different classes of creditors, and a joint meeting of those two classes is not legal (37).

Before ordering a meeting of the class of creditors with whom it is proposed to make an arrangement, it is not necessary that the Court should first have issued notice where the chairman of the meeting is careful to satisfy himself and to certify to the Court that notice of the application and of the meeting ordered had been sent to and acknowledged by all creditors. (38).

Where notice of a meeting to frame a scheme under this section is given to all creditors and one of them receiving the notice assigns the debt due to him to one of the debtors of the company before the date of the notified meeting, the assignee does not pass on to a new class of creditors, *viz.*, debtor-creditors. Such a case bears no analogy to cases where a set off is allowed in liquidation proceedings on the principle of bankruptcy laws (39).

**1140. Court's control over meetings** :—The section does not expressly give the Court control over the proceedings at the meeting ; but it seems to have an inherent power to give directions (40). Though "Court meetings" are subject to the directions of the Court, where no express direction is given the articles must be looked to so far as they are applicable (41).

"I think the Court has", says Vaughan Williams J., "an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies shall be evidenced, and to determine all such questions as whether it is necessary that the proxy shall be produced at the meeting" (42). Proxies on which the day of the meeting was not named were held to be good if properly stamped (43).

The terms of the section are wider than those of s. 120 of the English Act of 1908 (s. 153 of the English Act of 1929). Under this section the Court has ample power to settle a form of proxy and any substantial failure to comply with the Court's direction will invalidate the proxy (43).

A meeting of shareholders not convened exactly in accordance with the directions of the Court may be held good, if in the result a sufficient number of shares is accounted for (44).

**1141. Three-fourths in value** : The sanction of the three-fourths in value of the members of the class *present* in person or by proxy is sufficient although it may not be three-fourths in value of the total class (45).

**1142. Alternative mode of liquidation—stay of suits etc.** :—A scheme under this section is an alternative mode of liquidation, which by the operation of law relieves the company and its contributories from liability further than that which is contemplated or imposed by the scheme, any express words staying proceedings by creditors being unnecessary (46). It is therefore a provision with respect to winding

(36) *Hari Charan v. Ulipur Bank* [1942] C. 442, 46 C.W.N. 634, 75 C.L.J. 203, 201 I.C. 674.

(37) *Light of Asia Insurance Co.* [1942] 46 C.W.N. 441.

(38) *India Flour Mills Ltd.* [1934] S. 54, 149 I.C. 51.

(39) *Anukul v. Serajganj Loan Office Co.* [1939] 43 C.W.N. 1181.

(40) *English, Scottish & Australian Bank* [1893] 3 Ch. 385, 396.

(41) *Tata Iron & Steel Co.* [1928] B. 80, 30 Bom. L.R. 197.

(42) *English Scottish &c. Bank* (supra) ; see also *Dawson v. Hormusji* [1932] R. 154, 10 Rang. 438.

(43) *Tata Iron & Steel Co.* (supra) ; see also *Inter-Oceanic Ry. Co.* [1898] 3 Manson 162, and *English, Scottish & Australian Bank* (supra).

(44) *Anglo-Spanish Tarter Refineries* [1924] W.N. 222, 68 S.J. 738.

(45) *Bessemer Steel & Ordinance Co.* [1876] 1 Ch. D. 251.

(46) *London and Chartered Bank* [1893] 3 Ch. 540 ; *Dane, v. Mortgage Insurance Corp'n.* [1894] 1 Q.B. 54 ; *Matilal Kanji & Co. v. Natvarlal* [1932] B. 78, 33 Bom. L.R. 1495.

up within the meaning of s. 583 *post* (47). Failure of a scheme for resusciation of a company is not by itself sufficient to justify a winding up order being made. This section makes provision not merely for a scheme for the resusciation or reorganisation of companies, but it also provides for a scheme of arrangement, an alternative mode of liquidation, which the law allows the statutory majority of creditors to substitute for winding up, whether voluntary or under the Court (48).

**1143. Arrangement involving reduction of capital :—**If the scheme of arrangement involves a reduction of capital, all the requirements of the Act (see s. 100 *et seq.*) with regard to reduction must be complied with (49). The Court may, however, direct the application for sanction to stand over in order to enable the company to advertise the petition and otherwise comply with the requirements of the Act for reduction of capital (50). If the reduction of capital involves a diminution of the liability in respect of unpaid share capital or payment to any shareholder of any paid up capital, so as to entitle every creditor to object to such reduction, the special procedure prescribed by s. 101 *et seq.* must be followed (50). It is necessary to advertise the petition for sanctioning the scheme. Members or creditors who do not appear at the hearing of the petition cannot appeal without leave (51). A company having power under its articles of association to reduce its capital by paying off capital, cancelling lost capital, reducing the liability on its shares, "or otherwise as may seem expedient", is entitled to reduce its capital in any manner authorized by statute. The scheme for reduction of capital having been fully and properly explained to the shareholders without concealment of any relevant facts and approved, on a poll being taken by the requisite majorities of each class, ought properly to be approved by the Court (52). The directors are not under any duty to the shareholders to disclose to them in the circular explaining the scheme their holdings or respective proportional interests in ordinary and deferred shares (52).

**1144. Who are bound by the order :—**The order sanctioning the scheme becomes binding not only on the creditors but also on the liquidators and contributors, so that whether the scheme be a valid one or not, a shareholder cannot afterwards question it (53). A creditor being bound under this section by an arrangement between the company and its creditors, the omission of the company to raise a plea to this effect at the original trial is not a bar to its being raised in the execution proceeding (54).

When a scheme of composition under this section has been sanctioned by the High Court and it has further been decided that a particular decree-holder is bound by it, the High Court has power to restrain by injunction proceedings in execution started by the decree-holder in a maffasil Court after getting the decree transferred there (55).

**1145. Executing Court :—**A scheme sanctioned by the Court under this section covering creditors who had already brought suits or obtained decrees cannot be attacked collaterally in execution proceedings as one without jurisdiction, either on

(47) Travancore National &c. Bank [1939] M. 318.

(48) Per Tekchand J. in *Madan Gopal v. Peoples Bank of N. India* [1935] L. 779, 16 Lah. 1029, 158 I.C. 16.

(49) *White Pass Ry. Co.* [1918] W.N. 323, 63 S.J. 55; *Cooper, Cooper & Johnson* [1902] W.N. 199, 51 W.R. 314; *Bharati Central Bank* [1949] 53 C.W.N. 238; *Indian National Bank* [1948] 53 C.W.N. 207; *Bengal Bank Ltd. v. Suresh Chakravarty* [1951] 55 C.W.N. 206.

(50) *Indian National Bank* [1949] 53 C.W.N. 207—per Das J.

(51) *Securities Insurance Co.* [1894] 2 Ch. 410.

(52) *Imperial Chemical Industries* [1936] 1 Ch. 587.

(53) *Bowkett & Fuller's United Electric Works* [1923] 1 K.B. 160.

(54) *Harogopal v. Peoples Bank of N. India* [1934] L. 515, 152 I.C. 119, 35 P.L.R. 521.

(55) *Jalpaiguri B. & T. Corpn.* [1936] 40 C.W.N. 551.

the ground that notice of the meeting had not been served on the executing decree-holder or on the ground that the notice of the meeting was not served on the objector or that separate meetings of different classes of depositors had not been ordered. Such defects, even if made out, would not be errors of jurisdiction (56). An objection by the judgment-debtor company that the creditor's decree has been superseded by the scheme sanctioned is an objection under s. 47, C. P. Code (57). A scheme is not an adjustment within the meaning of O. XXI, r. 2, C. P. Code and does not require to be certified or recorded in order that the executing Court may recognize the scheme (58). When one Judge has sanctioned the scheme, it is not within the power of another Judge exercising equal jurisdiction to declare in effect that the scheme to the extent it affects a particular person is a nullity (59).

**1146. Date when compromise becomes binding :—**The agreement or compromise referred to in this section becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court (60). It is the proceeding of the meeting that is to be binding provided only that it does not fail to be subsequently sanctioned (60). Where one of the creditors had, between the date when the creditors voted upon the proposal and the date of the sanction of the High Court, obtained decree in respect of his debt, it was held that the agreement was binding upon him, it having taken effect from the date when it was arrived at and not merely from the date of the sanction (61). But a scheme sanctioned under this section does not date back to the time when the bank suspended payment. Where before the date of sanction a person was creditor to the extent of Rs. 4,000 and a debtor to the extent of Rs. 2,000, he must be relieved from liability as a debtor and must be deemed to be a creditor to the extent of Rs. 2,000 (62).

**1147. Assent of classes :—**If some of the classes of persons have no interest because the whole value of the assets is exhausted by those who have priority over them, the assent of that class at a meeting is not necessary and the Court can sanction the arrangement inspite of their opposition (63).

**1148. Directors' position :—**Where the directors of a company induced some of the shareholders to give their options to purchase their shares for securing consent of the majority to an amalgamation, and upon amalgamation the directors made profits, it was held that they were trustees of this profit for the benefit of those shareholders (64). If upon a reconstruction special privileges are made for the benefit of the directors, they must be disclosed; otherwise sanction of the members to the scheme will be inoperative (65).

**1149. Subsequent alteration and enforcement of the scheme :—**Under the old s. 153 the Privy Council held that where a proposed scheme accepted by a meeting of shareholders and approved by the Court was subsequently altered by changed circumstances, a meeting of shareholders should again be summoned to consider the

- (56) Mahiganj Loan Office v. Behari Lal [1936] 41 C.W.N. 406, [1937] C. 507; Krishna Nath v. Dinajpur Loan Office [1938] 2 Cal. 30, [1938] C. 337.
- (57) Mahiganj Loan Office v. Behari Lal (supra); Rajshahi Banking & Trading Co. v. Pulin Behari [1938] 42 C.W.N. 610.
- (58) Ibid; House of Labourers v. Comilla Banking Corpn. [1937] 173 I.C. 431.
- (59) Jalpaiguri Banking &c. Corpn. [1937] C. 401 per Lord-Williams J.
- (60) Raghubir v. Bank of Upper India [1919] 23 C.W.N. 697, 46 I.A. 135; Badarganj Loan Office v. Shaharuddin [1937] 41 C.W.N. 1272.
- (61) Raghubar v. Bank of Upper India [1915] 32 I.C. 451.
- (62) Chunnu Lal v. Bank of Upper India [1917] 40 I.C. 904.
- (63) Tea Corporation [1904] 1 Cs. 12.
- (64) Allen v. Hyat [1914] 30 T.L.R. 444 (P.C.).
- (65) Kaye v. Croydon Tramways Co. [1898] 1 Ch. 358.

amended scheme, and the Court had power to approve of the modification (66). A scheme duly sanctioned by Court provided that four of the directors should be elected from the creditors but omitted to make any provision as to how the creditors were to exercise their voting strength in electing the directors. The scheme however provided for consequential amendment of the articles of association. The members of the company sought to amend the articles in a way which would have the effect of giving equal voting strength to each creditor irrespective of the value of the debt due to him. In a petition by the creditors for heavy amounts (who were a minority) for amendment of the scheme: Held that in order to prevent a deadlock the aforesaid omission should be rectified and directions given for convening a meeting of creditors and shareholders, whereafter and not before, the members would consider the amendment of the articles at a meeting (67). The proper method of ascertaining the wishes of creditors was to take into account the value of each share (67).

Once a scheme was sanctioned and the order granting the scheme was perfected, it was a final order, and the Court sanctioning the scheme had no jurisdiction to alter or amend the scheme, except by way of a fresh scheme (68). So long as the order was not perfected the Court might, in exercise of its inherent power, rehear the application for sanction. After the order was completed and filed the Court could do nothing except correcting accidental omissions or mistakes in the order under the Code of Civil Procedure. The other remedy of the party aggrieved was to appeal from the order under sub-s. (7) of the old section (68). In the last noted case a scheme of amalgamation of two companies was sanctioned by the Court. One of the provisions of the scheme was that the depositors of the transferor bank would get fully paid up shares of Rs. 25 each in the transferee bank within 3 months from the date of sanction of the scheme, and for this purpose the capital of the transferee bank would be increased to Rs. 10,00,000. The scheme of amalgamation was sanctioned and the transferor bank was dissolved. But no sanction of the Central Government was obtained to the issue of the new shares: Held that this sanction was not a condition precedent of the sanction of the scheme, so it could be set aside on that ground.

Under the old s. 153, if a power had been given by the shareholders or creditors to the Court to modify the scheme passed by them, the Court could exercise that power. But that power was to be exercised judiciously and not arbitrarily (69). The Court could not modify a scheme as passed by a body of unsecured creditors who had expressly stated that the scheme passed by them was not to be modified by the Court (69).

Where a scheme which was not of the kind mentioned in s. 153A or 153B of the previous Act sanctioned otherwise than in the course of winding up, the Court sanctioning the scheme had no further seisin on the scheme and had no jurisdiction or power as the company Court to entertain any application for enforcing the scheme, or modifying it or to adjudicate upon the rights of parties arising under or out of the scheme, and parties claiming under or *dehors* the scheme should assert their rights in regular suits or proceedings as might be permissible in law (70). Neither the company, nor the creditors, nor the members could, by a provision in the scheme confer jurisdiction on the Court which it did not possess (70). Nor could the Court by sanctioning such a scheme arrogate to itself powers and jurisdiction which it did not otherwise possess. Hence where a scheme of the above description was sanctioned by the East Punjab High Court, it had no jurisdiction to

(66) *Kamalapat v. Union Indian Sugar Mills* [1929] P.C. 256, 50 C.L.J. 561; *Mahaluxmi Cotton Mills* [1949] 54 C.W.N. 80.

(67) *Mahaluxmi Cotton Mills* (supra).

(68) *Bank of Mymensing, Gouripur, Ltd.* [1949] 53 C.W.N. 143.

(69) *Vikram Cotton Mills v. Jwala Pd. Radha Krishna* [1955] A. 14.

(70) *Bhagwanti v. New Bank of India* [1950] E.P. 111 (F.B.).

entertain applications by the creditors of the bank, working under the scheme, for payment of instalments that had fallen due under the scheme but not paid, or for adjusting upon their claim to priority as preferential creditors or for like reliefs (70).

Now under the new s. 392 introduced by the Lok Sabha the High Court has power to supervise the carrying out of the compromise or arrangement, and may give directions in regard to any matter or make modifications in the compromise or arrangement. The provisions of s. 392 of the present Act apply to a company in respect of which an order has been passed before the commencement of this Act under s. 153 of the previous Act sanctioning a compromise or arrangement.

**1150. Withdrawal of sanction** :—"It is conceivable", observed Lord-Williams J. (71), "that the Court may have power to withdraw its sanction to any scheme, or may give leave to appeal against the order even though application for such leave has not been made within time [*Securities Insurance Co. (72)*]; but I apprehend that such serious steps will not be taken unless application for such withdrawal or leave is made promptly and before the position of those interested has been irretrievably altered as by the barring of claims or by the payment of dividends or by the acquirement of rights by any of the parties to an arrangement which has received the sanction of the Court. Upon this point reference may be made to the observations of Lord Esher, M. R. and Cotton, L. J. in *Nicholl v. Eberhardt Co.* [1890] 61 L. T. 489."

**1151. Appeal** :—There was no appeal under s. 202 of the previous Act from an order made under s. 153 thereof on an application by a company which was not in the course of being wound up (73). But a right of appeal has been given by enacting sub-s. 7 by the amending Act of 1936 (74). An order sanctioning a scheme of reconstruction of an insurance company by the dissolution of an old company and creation of a new one, even when such scheme involved the transfer of money deposited by the dissolved company under s. 7 of the Insurance Act, 1938 and the reduction of contracts of insurance, was an order under this section, and an appeal lay against such order under cl. (7) of the section. The Governor General in Council, even though he was not a party to the proceedings, and the Superintendent of Insurance were entitled to appeal against such order (75). Where the Court orders that proxy forms used at a meeting of creditors should be rejected and another such meeting should be held, such an order is a judgment within the Letters Patent and is appealable, since the effect of the order is to determine finally that the decision of the creditors who had duly voted for or against the scheme should not be ascertained or recorded and to render inoperative the poll (76). A mere stranger who would be benefited by the scheme cannot appeal (77).

Where a decree was obtained against the company before the scheme and execution was applied for after the scheme, and the company's objection thereto was overruled, the order was appealable (78).

(71) *Mymensingh Loan Office* [1937] C. 667, 41 C.W.N. 599.

(72) [1894] 2 Ch. 410.

(73) *Virangam S. & M. Co. v. Industrial Bank* [1925] B. 442, 27 Bom. L.R. 655.

(74) See also *Mymensingh Loan Office* (supra).

(75) *In re Light of Asia Insurance Co.* [1942] 46 C.W.N. 441.

(76) *Dawson v. Hormusji* [1932] R. 96, 10 Rang. 189 following *Levy Bros. & Knowles, Ltd. v. Subodh* [1927] C. 689, 31 C.W.N. 894, 103 I.C. 659. See also *Dawson v. Hormusji* [1932] R. 154, 10 Rang. 438, where the application for sanctioning the scheme was made by the liquidator.

(77) *Matilal Kanji & Co. v. Natvarlal* [1932] B. 78, 33 Bom. L.R. 1495.

(78) *Allambag Tea & Trading Co. v. United Bank of India* [1953] Ass. 107, [1952] 4 Ass. 189.



**1152. Re-organisation :—**Buckley (Lord Wrenbury) in his *Companies Act*, 11th ed. at p. 315 says: "All modes of re-organizing the share capital, even when involving an interference with preferences or special rights attached to shares by the memorandum of association, can be effected as part of an agreement with members under the section, with the possible exception, whilst s. 45 of the Act of 1908 (s. 54 of the previous Indian Act) was in force, of the two classes of re-organization of capital falling within that section, and subject to the qualification that if the arrangement involves a dealing with capital, *e.g.*, reduction of capital for which other sections of the Act prescribe special formalities, such formalities must also be complied with." Again, "It is no objection to an arrangement with classes of members under this section that it involves a winding-up of the company and a transfer of its undertaking to another company, including a foreign company, for fully or partly paid shares in that company for distribution amongst the different classes of members of the transferor company in manner or proportions provided by the arrangement. In such a case the Court may, but does not necessarily, insist upon dissentient members being given protection similar to that provided by s. 234 (s. 494 of the present Act) in the case of transfer under that section without the sanction of the Court. If however the so-called arrangement is really a transfer under s. 234 *simpliciter*, but without giving dissentients the protection provided by that section, *quære*, whether the transfer can be sanctioned as an arrangement under this section" (79).

The word "arrangement" in ss. 391 and 392 includes a reorganization of share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of those methods [s. 390 (b)].

**1153. Duty of Court :—**"What the Court has to do", says Lindley L. J., "is to see first of all, that the provisions of the statute have been complied with; and secondly, that the majority has been acting *bona fide*. The Court also has to see that the minority is not being overridden by a majority having interest of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly . . . take a view which can be reasonably taken by business men. The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting *bona fide* and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he would not approve of it" (80).

**1154. Modes of re-organisation :—**There are two modes of re-organization of share capital, namely, (a) by consolidation of shares of different classes, and (b) by division of shares into shares of different classes (81). There cannot be a scheme for total abolition of the existing classes and creation of fresh classes of shares (82). But a scheme of arrangement which alters any rights defined by the memorandum of association must satisfy the conditions laid down by this section, although the scheme does not include the consolidation of different classes of shares or the division of shares into shares of different classes (83).

(79) Buckley's *Companies Act*, 11th ed. pp. 315 and 316. See also *Katni Cement & Industrial Co.* [1937] B. 423, 39 Bom. L.R. 675.

(80) *Alabama &c. Ry. Co.* [1891] 1 Ch. 231.

(81) *Palace Hotel Ltd.* [1912] 2 Ch. 438; *J. A. Nordberg Ltd.* (infra); *E. D. Sassoon United Mills* [1929] B. 38, 30 Bom. L.R. 598.

(82) *E. D. Sassoon United Mills* [1929] B. 38, 30 Bom. L.R. 598.

(83) *Doeham Gloves, Ltd.* [1913] 1 Ch. 226 [*Palace Hotel Ltd.* (supra) was not followed in this case].

In a reorganization of share capital under this section a company may divide each of its £1 preference shares on which 15s. has been paid, into two different classes of shares of 10s. called "A. preference shares" and "B. preference shares" respectively and treat the former as fully paid up and the latter as being 5s. uncalled (84).

**1155. Preferential rights** :—Where preferential rights of members arise under the articles which provide for modification of those rights, they may be so modified without having regard to the provisions of this section, as those provisions only operate when the preferential rights are determined, not by the articles, but by the memorandum (85). But when the rights are determined by the memorandum, they cannot be interfered with unless the conditions required by this section are fulfilled. The proviso is one limiting the effect of the previous part of the section and is not in any sense an independent enactment operating beyond the limits of the particular section to which it is attached. Therefore in cases where a preference has been rightly given by the articles, such preference can be modified by special resolution (85).

A scheme of arrangement which interferes with rights conferred by the memorandum, e.g., diminishes the rights of preference shareholders to dividends, may be validly effected under the present section (86). But where the only persons interested in any profits in excess of the fixed dividend payable on the ordinary shares are the shareholders themselves, the Court ought, in the exercise of its discretion, confirm the special resolution for reorganizing the share capital (87).

Where one of the conditions in the memorandum of association is that the rights and privileges of different classes of shareholders are subject to variation, a resolution which has the effect of sweeping away the rights and privileges attached to ordinary and deferred shares and which leaves the two classes of shares with precisely the same rights, is perfectly valid and does not require the sanction of the Court. But where even after this resolution a deferred share cannot be sold as an ordinary share, a proposal to make these two classes of shares into one class involves a consolidation of the different classes of shares and such consolidation modifies the condition of the memorandum of association (88).

Where by an agreement A. company was entitled to act as manager of B. company and to receive in respect of each financial year of the B. company 50 per cent. of its net profits as well as a management share with very important rights attached to it, and B. company having been desirous of putting an end to the management by A. company an agreement was prepared terminating the management in consideration of the payment to A. company of 100,000 £. to be raised by B. company by the issue of debenture stock and incidentally the management share was to be converted into an ordinary share, it was held that it was not *ultra vires* the B. company to enter into the proposed agreement, it being no objection to the agreement that it involved the redemption of the annual charge on the B. company's net profits out of capital raised for the purpose (89).

**1156.** To comply with the provisions of this section a majority of three-fourths in value of the shareholders of that particular class must be present or represented when the resolution is passed; and it must be passed at a meeting voting by proxy being allowable when such votings are allowed by the articles (90).

(84) *Vine &c. Trust Ltd.* [1913] 108 L.T. 709.

(85) *Australian Estates &c. Co.* [1910] 1 Ch. 414.

(86) *A. Nordberg Ltd.* [1915] 2 Ch. 439.

(87) *Garden Village Ltd.* [1929] 1 Ch. 230.

(88) *British India Corp'n v. Shanti Narain* [1935] A. 310. [1935] A.L.J. 527, 156 I.C. 1088.

(89) *Investment Trust Corp'n. v. Singapore Traction Co.* [1935] Ch. 615 (C.A.).

(90) *Foucar & Co.* [1913] W.N. 83, 29 T.L.R. 350.

Where a company by special resolution reorganized its share capital in such a manner that the liability of the company to the shareholders was reduced, but the nominal amount of the share capital was not reduced, it was held that the company had rightly adopted the procedure prescribed by this section in order to obtain confirmation of the reorganization scheme (91).

A resolution passed by half of the preference shareholders, who represented three-fourths of the share capital of their class, did not comply with the provisions of this section (92). Although a single member cannot constitute a "meeting" in the ordinary sense of the word, the context may show the word to be used in an unusual sense and in such a way as to include the formal consent of the sole member of the class, the consent of which is required to be obtained (93).

The wide powers which the Court had in confirming a scheme was well shown in the case where a dissentient shareholder was compelled to receive 4½% debentures for 5½% cumulative shares (94).

**1157. Class meetings** :—"Only by the clearest words", observed Lord Blanesburgh, "and in full knowledge of their rights, will a class be bound by a resolution which, it is suggested, modifies or extinguishes those rights" (95). The opportunity afforded to the class of discussing their own affairs undisturbed by opposing or conflicting interests is the modest protection against possible oppression offered by a class meeting (96). As to how class meetings should be conducted see the last cited case.

It was not necessary to advertise a petition for reorganization of the share capital (97).

**392. Power of High Court to enforce compromises and arrangements.**—(1) Where a High Court makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it—

(a) shall have power to supervise the carrying out of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company,

(91) *Peebles Hotel Hydropathic Ltd.* [1920] S.C. 303; see also *Scottish India Rubber Ltd.* [1919] Sc. L.R. 56 (Ct. of Sess.).

(92) *Arden Coal Co.* [1922] S.C. 500.

(93) *East v. Bennett Brothers* [1911] 1 Ch. 163.

(94) *Thomas De La Rue & Co.* [1911] 2 Ch. 361.

(95) *Carruth v. Imperial Chemical Industries* [1937] A.C. 707 (746). See also *Quebrada Ry. & Co.* [1888] 40 Ch. D. 363.

(96) *Carruth v. Imperial Chemical Industries*, (*supra*) at p. 756.

(97) *Ashanti Development Co.* [1911] W.N. 144, 27 T.L.R. 498.

and such an order shall be deemed to be an order made under section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies Act, 1913 (VII of 1913), sanctioning a compromise or an arrangement.

This new section has been inserted by the Lok Sabha. It fills up a gap in the previous Act by giving power to the High Court to supervise the carrying out of the compromise or arrangement, to modify the same and to order the winding up of the company, if necessary. These provisions shall apply to a company in respect of which an order has been made sanctioning a scheme under s. 153 of the previous Act.

**393. Information as to compromises or arrangements with creditors and members.**—(1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391,—

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect; and in particular, stating any material interests of the directors, managing director, managing agent, secretaries and treasurers or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like information and explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on mak-

ing an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

(4) Where default is made in complying with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees; and for the purpose of this sub-section any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be punishable under this sub-section if he shows that the default was due to the refusal of any other person, being a director, managing director, managing agent, secretaries and treasurers, manager or trustee for debenture holders, to supply the necessary particulars as to his material interests.

(5) Every director, managing director, managing agent, secretaries and treasurers or manager of the company, and every trustee for debenture holders of the company, shall give notice to the company of such matters relating to himself as may be necessary for the purposes of this section; and if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees.

This section is new and corresponds to s. 207 of the English Act of 1948 which has been embodied as suggested in para 229 of the C. I. C. R. The arrangement suggested at page 309 of the Report has been embodied in sub-s. (1) (a)—*Notes on Clauses.*

**394. Provisions for facilitating reconstruction and amalgamation of companies.**—(1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a “transferor company”) is to be transferred to another company (in this section referred to as “the transferee company”);

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:—

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within fourteen days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) In this section—

(a) “property” includes property, rights and powers of every description; and “liabilities” includes duties of every description; and

(b) "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not.

This section corresponds to s. 153A of the previous Act and s. 208 of the English Act of 1948. The principle underlying the amendment suggested in para 230 and at page 310 of the C. L. C. R. has been incorporated—*Notes on Clauses*.

"We also consider that a suitable provision should be made in s. 153A of the present Act, whereby compromise or arrangement between foreign companies and companies within the meaning of the Indian Companies Act may be facilitated" (para 230 of the C. L. C. R.).

**1158. Scope :—**A company has no power to enter into, nor can the Court sanction, any arrangement or compromise with its creditors under this or the following section which necessarily involves the doing of any act which is *ultra vires* the company, being in excess of its corporate powers as defined in its memorandum of association. Thus where the objects of a company, as stated in its memorandum of association, did not include any power to sell or dispose of the company's undertakings, a scheme, which involved the transfer, in consideration of shares, of the entire undertaking and assets of the company to a new company to be formed for the purpose of acquiring those assets and gradually realizing them, was *ultra vires* and the Court had no jurisdiction to sanction it (98).

SS. 153A and 153B of the old Act indicated that amalgamation or merger of companies or corporations was a matter which related to the incorporation or registration of companies. The effect of Ordinance VIII of 1952 and the Iron and Steel Companies Amalgamation Act 79 of 1952 was to combine the Bengal Steel Corporation and the Iron and Steel Company and make their shareholders the co-owners of the combined assets and not to deprive them of their entire interest or ownership, which was essential for acquisition (99).

**1159. SUB-S. (1) Amalgamation :—**The word "amalgamation" has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company (1). "Amalgamation does not involve", observed Lindley M. R., "the formation of a new company to carry on the business of an old company. It includes that, but is not confined to that." . . . "I do not see how a company as a business transaction can practically amalgamate . . . with companies carrying on business unless the company in some way or other sells its assets as a whole—not for money, for that would be a simple sale—but for shares in the purchasing company" (2). "You may have a continuance of one of the companies," said Buckley J. "upon the terms that the undertakings of both corporations shall substantially be merged in one corporation only" (3).

**1160.** Where a decree directs a company to furnish accounts, and the company in the meanwhile transfers its business to another company, the latter is not bound by the decree as it is a distinct legal person; and the decree does not operate beyond the date of such transfer (4).

(98) *Oceanic Steam Navigation Co.* [1939] 1 Ch. 41.

(99) *Narayanprosad v. Indian Iron & Steel Co.* [1953] C. 695.

(1) *Re Walker's Settlement* [1935] Ch. 567, (C.A.) at pp. 582 and 586, per Romer and Maugham L. JJ. See also *Buckley's Companies Act*, 11th ed., p. 487.

(2) *Wall v. London & N. Assets Corpn.* [1898] 2 Ch. 464 (479).

(3) *South African Supply & Co. Co.* [1904] 2 Ch. 268 (287).

(4) *Fraser & Co. v. Bombay Ice Manufacturing Co.* [1904] 29 Bom. 107.

**1161. Contract of personal service not transferred** :—Where an order is made by the Court under this section for the amalgamation of two companies, a contract of personal service existing at the date of the amalgamation between a workman and the transferor company is not transferred thereby (5). "It is of course indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y" (6).

**1162. Right to service is not property** :—"At any rate", observed Lord Simon L. C., "after examination of s. 154 (corresponding to the present section) with close attention and considering the consequences of its application in different cases, I can come to no other conclusion than that an order under it does not automatically transfer contracts of personal service. The word 'contract' does not appear in the section at all, and I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest; it cannot be bought or sold; it forms no part of the assets of the employer for the purpose of administering the estate. In short s. 154, when it provides for 'transfer', is providing in my opinion, for the transfer of those rights which are not incapable of transfer and is not contemplating the transfer of rights which are in their nature incapable of being transferred" (7).

**1163. Contents of the order** :—An order made under this section should not contain any express limitation showing that the order will not operate to transfer purely personal contracts. Nor is it necessary to use the form of the order in R. S. C. Appendix 1, Form—3 (English), containing a schedule of the property transferred. The order itself transfers all the property of the transferor company to the transferee company for such estate and interest as the transferor company has. There is accordingly no need to specify the property transferred in the order (8).

**1164. Stamp** :—Where an old company on its being wound up conveyed to the new company some of its property by means of an instrument which in terms was a conveyance of property at an agreed value, it was held that the instrument was the sale of such property at that price and was governed by Art. 21 of the Stamp Act, 1879; and the fact that the transaction was a part of a larger transaction would not affect the character of the instrument (9). But if there is a vesting order made by the Court under sub-s. (2), no stamp, it is apprehended, will be payable upon the transfer.

A scheme of arrangement under this section was approved by the Court and its order provided that for the purpose of carrying out the scheme the official liquidator should transfer its assets and liabilities to another limited company. The official liquidator did so under a deed and the transferee company transferred the same to a newly floated company also under a deed. The deeds contained further covenants by the transferee as to payment of consideration. The newly floated company filed suits on the promissory notes executed in favour of the branch taken over by it. On a question whether the deeds of transfer of the assets and liabilities

(5) *Nokes v. Doncaster Amalgamated Collieries* [1940] A.C. 1014 reversing *Donoghue v. Doncaster A. Collieries* [1939] 2 K.B. 578.

(6) *Ibid*, per Lord Simon, L. C. at p. 1018.

(7) *Ibid*, per Lord Simon, L. C. at p. 1030.

(8) *L. Hotel Co.* [1946] 174 L. T. 302.

(9) Reference under Stamp Act [1895] 20 Bom. 432.



were liable to stamp duty; *Held* that where documents which are in form transfers of assets and liabilities by act of parties, though carried out pursuant to the order of the Court, are executed, they cannot be regarded as vouchers passed by the parties in token of their having carried out the terms of the Court's order. Such a document is a conveyance as defined in s. 2, cl. (10) of the Stamp Act and is to be stamped as such. The transfers cannot be treated as deeds of composition within Art 22 (10).

1165. SUB-S. (1) (b) (iv) :—This clause provides for the dissolution of the transferor company, when the transfer of its undertaking has been made and there appears to be no means of calling back to life the company so dissolved, for s. 243 of the old Act occurred in Part V dealing with winding up, whereas section 153A occurred in Part IV (11).

**395. Power and duty to acquire shares of shareholders dissenting from scheme or contract approved by majority.**—(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as “the transferor company”) to another company (in this section referred to as “the transferee company”), has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder, that it desires to acquire his shares; and when such a notice is given, the transferee company shall, unless, on an application made by the dissenting shareholder within one month from the date on which the notice was given, the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company:

Provided that where the shares in the transferor company of the same class as the shares whose transfer is involved are already held as aforesaid to a value greater than one-tenth of the aggregate of the values of all the shares in the company of such class, the foregoing provisions of this sub-section shall not apply, unless—

(a) the transferee company offers the same terms to all holders of the shares of that class (other than those already held as aforesaid) whose transfer is involved; and

(10) *Shahayanidhi (Virudunagar) Ltd. v. Subrahmanya* [1951] M. 209 (F.B.), [1950] 2 M.L.J. 216 (F.B.).

(11) *See Nokes v. Doncaster Amalgamated Collieries* [1940] A.C. 1014 at p. 1021.

(b) the holders who approve the scheme or contract, besides holding not less than nine-tenths in value of the shares (other than those already held as aforesaid) whose transfer is involved, are not less than three-fourths in number of the holders of those shares.

(2) Where, in pursuance of any such scheme or contract as aforesaid, shares, or shares of any class, in a company are transferred to another company or its nominee, and those shares together with any other shares or any other shares of the same class, as the case may be, in the first-mentioned company held at the date of the transfer by, or by a nominee for, the transferee company or its subsidiary comprise nine-tenths in value of the shares, or the shares of that class, as the case may be, in the first-mentioned company, then,—

(a) the transferee company shall, within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement), give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract; and

(b) any such holder may, within three months from the giving of the notice to him, require the transferee company to acquire the shares in question;

and where a shareholder gives notice under clause (b) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders were transferred to it, or on such other terms as may be agreed, or as the Court on the application of either the transferee company or the shareholder thinks fit to order.

(3) Where a notice has been given by the transferee company under sub-section (1) and the Court has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company, and pay or transfer to

the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire; and the transferor company shall thereupon register the transferee company as the holder of those shares:

Provided that an instrument of transfer shall not be required for any share for which a share warrant is for the time being outstanding.

(4) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(5) In this section—

(a) “dissenting shareholder” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract;

(b) “transferor company” and “transferee company” shall have the same meaning as in section 394.

(6) In relation to an offer made by the transferee company to shareholders of the transferor company before the commencement of this Act, this section shall have effect—

(a) with the substitution, in sub-section (1), for the words “the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary),” of the words “the shares affected” and with the omission of the proviso to that sub-section;

(b) with the omission of sub-section (2);

(c) with the omission in sub-section (3) of the words “together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company” and of the proviso to that sub-section; and

(d) with the omission of clause (b) of sub-section (5).

This section corresponds to s. 153B of the previous Act and s. 209 of the English Act of 1948.

**1166. Procedure for amalgamation of banking companies** :—As to the procedure for amalgamation of banking companies see the new s. 44A of the Banking Companies Act, 1949.

**1167. Scope** :—This section provides that where there is a contract or scheme for the acquisition by one company of shares in another company, which has been accepted by the statutory majority of shareholders in the latter company (in India three-fourths and in England nine-tenths), the transferee company can acquire compulsorily the shares of the minority, unless the Court orders otherwise. It does not confer any right on the Court to consider the merits of the contract, so far as concerns the majority of shareholders who have accepted it. In the case noted below (12) the matter was complete; the contract had gone through. The only question was whether the minority shareholders were to be left in possession of their shares or whether they could be compelled to sell them on the same terms as those which the other shareholders had accepted (12). The section is based on the view that *prima facie* the minority are acting unreasonably in refusing to come into line with the majority and ought to be forced into line, unless the Court orders otherwise. The Court must consider whether the attitude of the minority was reasonable. The burden is upon the dissentients to adduce reasons for thinking that the majority of shareholders were wrong (12).

Where a scheme or contract for the transfer of shares in one company to another company has, within four months after the making of the offer, been approved by the holders of not less than nine-tenths (under s. 155 of the English Act of 1929) in value of the shares affected, and the transferee company gives notice to any dissenting shareholder that it desires to acquire his shares, it is entitled and bound to acquire those shares, unless the dissentient shareholder, within one month, makes an application to the Court under this section and affirmatively establishes that in spite of the majority in favour of accepting the offer the scheme is unfair or the price offered for the shares is inadequate (13).

**1167A. Sub-s. (1).** “Within four months after the making of the offer :—These words describe a maximum period within which the event contemplated, namely the approval of the offer by holders of not less than nine-tenths in value (in England) of the shares whose transfer is involved, may occur. It is competent to the transferee company to fix a shorter period within the four months during which the offer must be accepted (14).

**1168. Where Court orders otherwise** :—The Court would be justified in not accepting the opinion of the majority where, for instance, there has been misrepresentation which may have influenced the view of the majority, or where there is the possibility of some unfair dealing, for example, the directors of the transferor company having some ulterior motive in advising the shareholders to accept the offer, or the majority of shareholders having some interest conflicting with that of the minority, for instance, being interested in the transferee company, and therefore willing to accept a less value for their shares. Another ground on which the Court might “order otherwise” would be if it were proved that the acceptance of the offer was based on a wrong principle of valuing the company's assets and as a result thereof the offer for the share was substantially less than it ought to have been. But if one starts with the presumption that the majority of shareholders were right, it is no good allowing detailed criticism of the valuation (12).

Where not less than nine-tenths of the shareholders in the transferor company approve a scheme involving the transfer of the company's shares to a transferee com-

(12) *Government Telephone Board, Ltd. v. Scervai* [1943] B. 325, 45 Bom. L.R. 633—per Beaumont, C. J. & Kania J.

(13) *In re Evertite Locknuts, Ltd.* [1945] 1 Ch. 220.

(14) *Re Western Manfg. (Reading) Ltd.* [1955] 3 A.E.R. 733.

pany, *prima facie* the offer must be taken to be a fair one, and the Court will not 'order otherwise' unless it is affirmatively established that notwithstanding the views of a very large majority of shareholders, the scheme is unfair (15).

**1169. Court's powers** :—The Court can direct that the transferee company is not to exercise the powers of compulsory purchase, but it has no power to direct the transferee company to pay the dissenting members something which they have not offered to pay. In case where the Court is asked to approve of a contract, it cannot require the purchaser to disclose the basis on which his offer was made (16).

**1170. Discovery of documents** :—The dissentient shareholders in a transferor company applied to the Court for an order that they were not bound to transfer their shares to the transferee company. The applicants alleged that the purchase price of the shares had been arrived at as the result of an under-valuation of the assets and applied for discovery of the documents relating to that matter which were or had been in the possession of the transferee company : *Held* that in the absence of special circumstances an order for discovery would not be made (17).

**1171. Valuation** :—The onus is upon the dissentients and it is not discharged merely by showing that the offer was based upon an erroneous valuation of assets. An offer based on no valuation at all, based for instance on stock exchange dealings in the shares, might have been a very good offer (16). In valuing concerns of a type, where the assets are over crores of rupees, a difference in value of a few thousands or even a lac or two on one item, can hardly justify the Court in interfering, because another expert might urge that on another item there was an over-valuation (16).

One M. B. Co. Ltd. offered to acquire all the fully paid up ordinary shares of P. C. Ltd. and to allot for every hundred 5s. ordinary share in P. C. Ltd. seven £1 ordinary shares in the M. B. Co. This scheme was based on a value of 7s. each for the ordinary shares of P. C. Ltd. being 9d. above the market value of £5 each for the shares of the M. B. Co., the mean market quotation of which on the material date was £5 5s. There were 1,116 shareholders of P. C. Ltd. and all accepted the offer except one who applied for an order that he was not bound to accept the offer : *Held* (1) that it was not established on the facts that the scheme was unfair ; (2) that it was right to take the Stock Exchange values of the shares at the material time as the basis of the terms of the transfer, and therefore the application must be refused (18).

**1171A. "Notice in the prescribed manner"** :—The notice to any dissentient shareholder in pursuance of sub-s. (1) or sub-s. (2) shall be given in the manner provided in s. 53 for the service of a document by a company on a member thereof—*vide* Rule 12 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**Form** :—For the form of notice to dissentient shareholders, pursuant to this section, see Form No. 35 in Annexure 'A', *ibid*.

**1172. Arrangement and amalgamation** :—It has been held in England that upon a petition to sanction a scheme of arrangement under s. 155 of the English Act of 1929 (corresponding to s. 395) the Court has power to determine the terms upon which the shares of shareholders, who have dissented from the scheme approved by the majority, shall be acquired, notwithstanding that since the original offer made the scheme has been superseded by a later amalgamation which has absorbed the transferee company, and the fact that the petitioners cannot offer to

(15) Hoare & Co. [1934] 150 L.T. 374.

(16) Government T. Board Ltd. v. Seervai (supra).

(17) Press Caps Ltd. [1948] 2 A.E.R. 638—per Roxburgh J.

(18) Press Caps Ltd. [1949] 1 A.E.R. 1013 (C.A.).

the dissentients the original shares accepted by the majority makes no difference to the jurisdiction of the Court which is only bound to decide whether the terms offered are adequate and reasonable, and if not, to substitute such other terms of purchase as in its discretion are fair and just (19).

For meaning of amalgamation see notes to s. 394.

**1173. Costs :**—In a petition under this section costs should follow the event in the normal course (20).

For the cases relating to amalgamation and reconstruction, see notes to s. 493.

**396. Power of Central Government to provide for amalgamation of companies in national interest.**—(1) Where the Central Government is satisfied that it is essential in the national interest that two or more companies should amalgamate, then, notwithstanding anything contained in sections 394 and 395 but subject to the provisions of this section, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution; with such property, powers, rights, interests, authorities and privileges; and with such liabilities, duties, and obligations; as may be specified in the order.

(2) The order aforesaid may contain such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

(3) Every member or creditor (including a debenture holder) of each of the companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the company resulting from the amalgamation as he had in the company of which he was originally a member or creditor; and to the extent to which the interest or rights of such member or creditor in or against the company resulting from the amalgamation are less than his interest in or rights against the original company, he shall be entitled to compensation which shall be assessed by such authority as may be prescribed.

The compensation so assessed shall be paid to the member or creditor concerned by the company resulting from the amalgamation.

(4) No order shall be made under this section, unless—

(a) a copy of the proposed order has been sent in draft to each of the companies concerned; and

(19) *Castner-Kellner Alkali Co.* [1936] 2 Ch. 349.

(20) *Government T. Board Ltd. v. Secrvai* (supra).

(b) The Central Government has considered, and made such modifications, if any, in the draft order as may seem to it desirable in the light of any suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

(5) Copies of every order made under this section shall, as soon as may be after it has been made, be laid before both Houses of Parliament.

This is a new provision and it is intended to provide, at the instance of the Government, for the amalgamation of two or more companies in the national interest. Occasionally cases arise where such an amalgamation in the national interest is clearly a necessity. The observance of the usual procedure prescribed by the existing Act in such cases will lead to prolonged delays which will be detrimental to the national interest. It has been made clear that any order made by the Government should provide for the old shareholders, and the old debenture-holders and other creditors, having the same interest in the company resulting from the amalgamation as they had in the original companies. Any order made by the Government under this section will be laid on the table of the Houses of Parliament and will therefore be subject to the Parliamentary scrutiny—*Notes on Clauses.*

## CHAPTER VI

### PREVENTION OF OPPRESSION AND MISMANAGEMENT

#### *A. Powers of Court*

**397. Application to Court for relief in cases of oppression.**—(1) Any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Court for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Court is of opinion—

(a) that the company's affairs are being conducted in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on

the ground that it was just and equitable that the company should be wound up;

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

SS. 397 to 409 deal with the prevention of oppression by, and the mismanagement of companies (*vide* J.C.R., para 146).

SS. 397 to 407 are intended to reproduce with some changes the provisions of ss. 153C and 153D of the previous Act which were added by Act LII of 1951. See paras 198—202 and redrafts of ss. 153C and 153D at pages 426 to 430 of the C. L. C. R.—*Notes on Clauses*.

S. 397 deals with the case of oppression on any member or members of the company. Compare s. 210 of the English Act of 1948 and cl. (b) of s. 153C (1) of the previous Act—*Notes on Clauses*.

**1174. Application :—**The corresponding section (s. 153C) of the old Act applied to a stage before the order for winding-up was passed by the Court and had no operation to a case where an order for winding-up had been passed long before (21). If the company or any of its members satisfied the Court that the company could be continued without the conduct of its business being subject to the complaint of its being oppressive to some part of the members, the Court would not have found it just and equitable to order the winding-up of the company (21).

As to an application under ss. 397 and 398 see notes to s. 399.

**1175. Procedure :—**Where the allegations in the petition in respect of the claim under s. 210 of the English Act of 1948 showed that there was acute conflict between the parties and the petition was grounded on an allegation that the affairs of the company required investigation, the petitioners were justified in supporting the statutory affidavit by exhibiting the documents and filing the affidavit of the ex-secretary. Therefore the costs of those items should be allowed (22).

**1175A. Scope :—**Before taking action under s. 397 the Court must be satisfied that circumstances exist on which an order for winding up can be made under s. 433. The true scope of s. 153C of the previous Act was that whereas prior to its enactment the Court had no option but to pass an order for winding up when the conditions mentioned in s. 162 of the old Act were satisfied, it could now, in exercise of the powers conferred by s. 153C make an order for its management by the Court with a view to its being ultimately salvaged. Where therefore the facts proved did not make out a case for winding up under s. 162 of the old Act, no order could be passed under s. 153C thereof (23).

The words "just and equitable" in s. 162 (vi) of the old Act [s. 433 (f) of the present Act] are not to be construed *ejusdem generis* with the matters mentioned in cls. (i) to (v) of that section, and therefore, whether mismanagement of the directors is a ground for a winding up order under s. 162 (vi) of the old Act becomes a question to be decided on the facts of each case. Where nothing more is established than that the directors have misappropriated the funds of the company, an order for winding up would not be "just and equitable", because if it is a sound concern, such an order must operate harshly on the rights of the shareholders. But if, in addition to such misconduct circumstances exist which render it desirable in the interests of the shareholders that the company should be wound up, there is nothing in s. 162 (vi) [now s. 433 (f)] which bars the jurisdiction of the Court to

(21) *Md. Abdulla v. Gopala* [1952] Tr.—Coch. 243.

(22) *S. A. Hawken Ltd.* [1950] 2 A.E.R. 408.

(23) *Rajahmundry E. Supply Corpn. v. Nageshwara* [1956] S. C. 213.



make such an order (23). In the circumstances of the last cited case, it was held by the Supreme Court that the Court had power to direct winding-up of the company.

The law is that Courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long as they are acting within their powers; but this rule can by its very nature apply only when the company is a running concern. But when an application is presented to wind up a company, its very object is to put an end to its existence and for that purpose to terminate its management and to vest it in the Court. Where accordingly a case has been made out for an order for winding up under s. 162 of the old Act (now s. 433) the appointment of administrators under s. 153C (now the present section) cannot be attacked on the ground that it is an interference with the internal management of the affairs of the company. If a liquidator can be appointed to manage the affairs of a company when an order for winding up was made under s. 162, an administrator could be appointed to manage its affairs when action was taken under s. 153C of the old Act (23).

**1176. Order regulating conduct of company's affairs :—**The prayer in the petition asked : (i) that an order might be made for regulating the conduct of the company's affairs in future ; (ii) or that such other order, whether directing investigation into the company's affairs or otherwise might be made as in the premises should be just : *held*, from the prayer it was impossible to know what the petitioner wanted. A petitioner seeking relief under s. 210 (of the English Act of 1948) ought to state in the prayer in clear terms the general nature of the relief sought whether it be by the appointment of a director or of some other kind. The prayer need not contain as much detail as the Court would require on the drawing up of the order or in a draft minute. It must however contain enough to leave no doubt what the petitioner desires the Court to do (24).

**1177. Appeal :—**An order passed by a single Judge of a High Court appointing an interim Receiver under s. 153C of the old Act (corresponding to the present section) read with Or. 40, r. 1 C. P. Code pending the final disposal of an application under s. 153C of the old Act was not open to an appeal under s. 202 of the Act (corresponding to s. 483 of the present Act). Since relief under s. 153C was an alternative relief in place of the winding-up of the company, it could not be said that the order was made in the matter of winding up of a company (25). Though such an order is appealable under s. 104 read with Or. 41, r. 1 C. P. C. the provisions of which are applicable to High Courts, it does not mean that the right of appeal is exercisable independently of the Letters Patent. Such an order being not a judgment within the meaning of the Letters Patent is not appealable (25).

### **398. Application to Court for relief in cases of mismanagement.—**

—(1) Any members of a company who complain—

(a) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of

(24) *Re Antigen Laboratories Ltd.* [1951] 1 A.E.R. 110.

(25) *Vishnu Pratap v. Revati Devi* [1953] A. 647.

the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors, or of its managing agent or secretaries and treasurers, or in the constitution or control of the firm or body corporate acting as its managing agent or secretaries and treasurers, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company;

may apply to the Court for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Court is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

This section deals with the case where the management is conducted prejudicially to the interests of the company, and is based upon cl. (a) of s. 153C (1) of the previous Act- *Notes on Clauses*.

1177A. Where a shareholder alleges that the managing director has perpetrated a fraud on the company in collusion with the auction purchaser in selling the company's property at an unconscionably low price, he has a specific remedy under this section (26).

**399. Right to apply under sections 397 and 398.** --(1) The following members of a company shall have the right to apply under section 397 or 398:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Court under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the Court dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

This section reproduces the effect sub-s. (3) of s. 153C of the previous Act. Sub-s. (2) reproduces the last portion of s. 153C (7) of the redraft at page 427 of the C. L. C. R. Sub-s. (4) provides for the Government conferring on any member or members, although the interest held by such member or members is not sufficient to bring them within the scope of sub-s. (1) (a), the right to apply under s. 397 or s. 398—*Notes on Clauses*.

This was originally cl. 369 of the Bill which has been altered by the Joint Committee with the following observation : "In clause 398 (now s. 399), the provision in the existing Act [section 153C (3) (a) (i)] for 100 members of a company having a share capital, making an application under the clause, has been restored. In clause 401 (now s. 402), new clauses (c) and (f) reproduce the provisions of the existing Act [section 153C (5) (c) and (f)] as in the opinion of the Committee, there is no sufficient justification for omitting them (*vide*, J.C.R., para 146).

**1177B. Petition** :—The validity of a petition must be judged on the facts as they were at the time of its presentation. A petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation (27). Thus where the applicant under s. 153C of the previous Act (corresponding to the present section) had obtained the consent of not less than one-tenth in number of the members and had presented the application, the withdrawal of consent by some of those members subsequently could not affect either the right of the applicant to proceed with the application or the jurisdiction of the Court to dispose of it on its merits (27).

**1178. Sub-s. (3). "Consent in writing" :—**The expression "consent in writing" in corresponding s. 153C (3) of the old Act implied that the writing itself should indicate that the persons who had affixed their signatures had applied their minds to the question before them and had given their consent to a certain action being taken. If a person obtains another shareholder's signature on a blank piece of paper and wished to supplement it by an affidavit or an oral sworn statement of himself or his agent, the signature on the blank paper does not become consent in writing (28). The law required that the consent should be given in the form of a document which itself should prove the consent. No evidence either by way of affidavit or sworn statement can be given under s. 91, Evidence Act to prove the consent (28).

Under s. 153C of the old Act the obtaining of the consent was a condition precedent to the making of the petition. A consent given subsequent to the filing of the petition was invalid (28).

**1178A. Sub-s. (4). Application for being authorised. Rule :—**As to the contents and other requirements regarding an application for being authorised under this sub-section, see Rule 13 of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.

**400. Notice to be given to Central Government of applications under sections 397 and 398.—**The Court shall give notice of every application made to it under section 397 or 398 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order under that section.

This section provides for notice being given to Government of every application under s. 397 or 398—*Notes on Clauses*.

**401. Right of Central Government to apply under sections 397 and 398.—**The Central Government may itself apply to the Court for an order under section 397 or 398, or cause an application to be made to the Court for such an order by any person authorised by it in this behalf.

This section reserves the right conferred on Government by sub-s. (2) of s. 153C of the previous Act to make an application itself. The right is however confined to cases falling under s. 243 of the present Act. Compare s. 210 (1) of the English Act of 1948. It is not considered desirable that the Government should have the right to apply in cases not falling within the scope of s. 243, having regard especially to 399 (4) which gives power to Government to authorise any member or members to make application under s. 397 or s. 398—*Notes on Clauses*.

**402. Powers of Court on application under section 397 or 398.—**Without prejudice to the generality of the powers of the Court under section 397 or 398, any order under either section may provide for—

(a) the regulation of the conduct of the company's affairs in future;

(b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely:—

- (i) the managing director,
- (ii) any other director,
- (iii) the managing agent,
- (iv) the secretaries and treasurers, and
- (v) the manager,

upon such terms and conditions as may, in the opinion of the Court, be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Court it is just and equitable that provision should be made.

See sub-s. (5) of s. 153C of the previous Act. Cls. (c) and (f) of sub-s. (5) of that section were much too general and comprehensive and it does not seem to be necessary to confer those powers specifically on the Court—*Notes on Clauses*.

**403. Interim order by Court.** —Pending the making by it of a final order under section 397 or 398, as the case may be, the Court may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the

conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable.

This is a new provision, and it gives power to the Court to pass an interim order—*Notes on Clauses*.

**404. Effect of alteration of memorandum or articles of company by order under section 397 or 398.**—(1) Where an order under section 397 or 398 makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make without the leave of the Court, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(2) Subject to the provisions of sub-section (1), the alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act; and the said provisions shall apply accordingly to the memorandum or articles as so altered.

(3) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within fifteen days after the making thereof, be filed by the company with the Registrar who shall register the same.

(4) If default is made in complying with the provisions of sub-section (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

This section is based on sub-s (6) of s. 153C of the previous Act—*Notes on Clauses*.

**405. Addition of respondents to application under section 397 or 398.**—If the managing director or any other director, the managing agent, secretaries and treasurers or the manager, of a company, or any other person, who has not been impleaded as a respondent to any application under section 397 or 398 applies to be added as a respondent thereto, the Court shall, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

This section deals with a minor matter of procedure, and corresponds to sub-s. (9) of s. 153C of the previous Act—*Notes on Clauses*.

**406. Application of sections 539 to 544 to proceedings under sections 397 and 398.**—In relation to an application under section 397 or 398, sections 539 to 544, both inclusive, shall apply in the form set forth in Schedule XI.

This section is based on sub-s. (10) of s. 153C of the previous Act—*Notes on Clauses*.

This was originally cl. 376 of the Bill which has been altered by the Joint Committee with the following observation : "Clause 405 (now s. 406) provides for the application of clauses 536 to 541 of the Bill (now ss. 539 and 544) in relation to complaints preferred under clause 396 and 397 (now ss. 397 and 398). It is considered desirable to set out the exact form in which the clauses in question are to apply in a Schedule. This is done by new Schedule XI of the Bill as amended by the Committee" (*vide* J.C.R., para 146).

**407. Consequences of termination or modification of certain agreements.** —(1) Where an order of a Court made under section 397 or 398 terminates, sets aside, or modifies an agreement such as is referred to in clause (d) or (c) of section 402,—

(a) the order shall not give rise to any claim whatever against the company by any person for damages or for compensation for loss of office or in any other respect, either in pursuance of the agreement or otherwise;

(b) no managing or other director, managing agent, secretaries and treasurers, or manager whose agreement is so terminated or set aside and no person who, at the date of the order terminating or setting aside the agreement was, or subsequently becomes, an associate of such managing agent or secretaries and treasurers shall, for a period of five years from the date of the order terminating the agreement, without the leave of the Court, be appointed, or act, as the managing or other director, managing agent, secretaries and treasurers, or manager of the company.

(2) (a) Any person who knowingly acts as a managing or other director, managing agent, secretaries and treasurers, or manager of a company in contravention of clause (b) of subsection (1);

(b) where the person so acting as managing agent or as secretaries and treasurers is a firm or body corporate, every partner in the firm, or every director of the body corporate who is knowingly a party to such contravention; and

(c) every other director or every director, as the case may be, of the company, who is knowingly a party to such contravention;

shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) No Court shall grant leave under clause (b) of subsection (1) unless notice of the intention to apply for leave has

been served on the Central Government and that Government has been given an opportunity of being heard in the matter.

This section corresponds to s. 153D of the previous Act. The disability imposed on the associate of a managing agent by this section will extend both to a person who is an associate on the date of the making of the order and to a person who is an associate at any subsequent time during the disqualifying period—*Notes on Clauses.*

## B. POWERS OF CENTRAL GOVERNMENT

**408. Powers of Government to prevent oppression or mismanagement.** —(1) Notwithstanding anything contained in this Act, the Central Government may appoint not more than two persons, being members of the company, to hold office as directors thereof for such period, not exceeding three years on any one occasion, as it may think fit, if the Central Government, on the application of not less than two hundred members of the company or of members of the company holding not less than one-tenth of the total voting power therein, is satisfied, after such inquiry as it deems fit to make, that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company:

Provided that in lieu of passing an order as aforesaid, the Central Government may, if the company has not availed itself of the option given to it under section 265, direct the company to amend its articles in the manner provided in that section and make fresh appointments of directors in pursuance of the articles as so amended, within such time as may be specified in that behalf by the Central Government.

(2) In case the Central Government passes an order under the proviso to sub-section (1), it may, if it thinks fit, direct that until new directors are appointed in pursuance of the order aforesaid, not more than two members of the company specified by the Central Government shall hold office as additional directors of the company.

(3) For the purpose of reckoning two-thirds or any other proportion of the total number of directors of the company, any director or directors appointed by the Central Government under sub-section (1) or (2) shall not be taken into account.

This new section has been introduced by the Joint Committee with the following observation : "The Committee are of the opinion that the Central Government should be vested with power to prevent mismanagement or oppression by nominating



one or two members of the company to hold office as directors for a period not exceeding three years" (*vide* J.C.R., para 146).

In this section the Proviso to sub-s. (1) and the sub-ss. (2) and (3) have been added by the Lok Sabha.

**409. Power of Central Government to prevent change in Board of directors likely to affect company prejudicially.** —(1) Where a complaint is made to the Central Government by the managing director or any other director, the managing agent, or the secretaries and treasurers, of a company that as a result of a change which has taken place or is likely to take place in the ownership of any shares held in the company, a change in the Board of directors is likely to take place which (if allowed) would affect prejudicially the affairs of the company, the Central Government may, if satisfied, after such inquiry as it thinks fit to make that it is just and proper so to do, by order, direct that no resolution passed or action taken to effect a change in the Board of directors after the date of the complaint shall have effect unless confirmed by the Central Government; and any such order shall have effect notwithstanding anything to the contrary contained in any other provision of this Act or in the memorandum or articles of the company, or in any agreement with, or any resolution passed in general meeting by, or by the Board of directors of, the company.

(2) The Central Government shall have power when any such complaint is received by it, to make an interim order to the effect set out in sub-section (1), before making or completing the inquiry aforesaid.

(3) Nothing contained in sub-section (1) and (2) shall apply to a private company, unless it is a subsidiary of a public company.

This section also has been inserted by the Joint Committee with the following observation : "New clause 408 (now s. 409) merely reproduces in a permanent form the provisions of section 86J (2) of the existing Act. That section was included in Schedule XI of the Bill as introduced and could therefore have remained in force only for a period of three years" (*vide* J.C.R., para 146).

## CHAPTER VII

### CONSTITUTION AND POWERS OF ADVISORY COMMISSION

**410. Appointment of Advisory Commission.**—For the purpose of advising the Central Government on the matter referred to in clause (a) of section 411, on the applications referred to in clause (b) of that section and on such other matters as the Central Government may think fit, the Central Government shall—

(a) constitute a Commission (hereinafter called the "Advisory Commission") consisting of not more than five persons with suitable qualifications; and

(b) appoint one of those persons to be the Chairman of the Commission.

The new sections 410 to 415 have been inserted by the Joint Committee with the following observations: "The Indian Companies (Amendment) Act of 1951 (Act I.II of 1951) provides for the setting up of a Commission of not more than three persons to advise the Government in regard to the exercise of the powers conferred on them by that Act. It was represented to the Committee that the time has now come for the replacement of this Commission by a statutory body to which most of the powers conferred on the Central Government by the Bill could be assigned. Although this view has the support of the Company Law Committee, the Joint Committee consider that much the preferable course will be to keep the provision in the Bill as introduced, that is, to continue the commission on an advisory basis. The Committee are of opinion that responsibility for the due fulfilment of the functions assigned by the Bill to the Central Government should squarely be placed on the Government and that nothing should be done to impair or obscure this responsibility.

"Although the Joint Committee have thus retained the commission on an advisory basis, they think that it should be put on a permanent footing instead of its life being restricted to a period of three years as was proposed in the Bill (Schedule XI—Part VI, read with original clause 598). The Committee have, however, increased the maximum membership from 3 to 5, so as to enable Government to provide for the adequate representation of all the different interests concerned—see clause 409 (now s. 410), sub-clause (a). At the same time, the Committee have also extended the scope of the Commission by providing that it should advise the Government on all matters which are referred to it instead of only on those falling within the scope of the 1951 Act—see clause 410 (now s. 411), sub-clause (b) [now sub-cl. (c)]. The other clauses in this Chapter reproduce in a much clearer form the provisions of section 289 B of the existing Act" (*vide* J. C. R., para 147).

**411. Duties of Advisory Commission.**—It shall be the duty of the Advisory Commission to inquire into and advise the Central Government—

(a) before a notification is issued under section 324 in respect of any description of industry or business, on the necessity for, and advisability of, issuing the notification;

(b) on all applications made to the Central Government under section 259, 268, 269, 310, 311, 326, 328, 329, 332, 343, 345, 346, 352, 408, or 409; and

(c) on all other matters which may be referred to the Commission by the Central Government.

See notes to s. 410.

In this section cl. (a) has been added by the Lok Sabha.

**412. Forms and procedure in cases referred to Advisory Commission.**—(1) Every application made to the Central Govern-

ment under any of the sections referred to in clause (b) of section 411 shall be in such form as may be prescribed.

(2) (a) Before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made.

(b) Such notice shall be published at least once in a newspaper in a principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district.

(c) Copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.

(d) Nothing in clause (a), (b) or (c) shall apply to a private company which is not the managing agent of a public company.

See notes to s. 410.

**413. Powers of Advisory Commission.**—For the purpose of making any inquiry under section 411, the Advisory Commission may—

(a) require the production before it of any books or other documents in the possession, custody or control of the company and relating to any matter under inquiry;

(b) call for any further information or explanation, if the Commission is of opinion that such information or explanation is necessary in order that the books or other documents produced before it may afford full particulars of the matter to which they purport to relate;

(c) with such assistants as it thinks necessary, inspect any books or other documents so produced and make copies thereof or take extracts therefrom;

(d) require any managing director or any other director, managing agent, secretaries and treasurers, manager or other officer of the company, or any shareholder or any other person who, in the opinion of the Commission, is likely to furnish information with respect to the affairs of the company relating to any matter under inquiry, to appear before it and examine such person on oath or require him to furnish

such information as may be required; and administer an oath accordingly to the person for the purpose.

See notes to s. 410.

**414. Penalties.**—If any person refuses or neglects to produce any book or other document in his possession or custody which he is required to produce under section 413 or to answer any question put to him relating to any matter under inquiry, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine.

See notes to s. 410.

**415. Immunity for action taken in good faith.**—No suit or other legal proceeding shall lie against the Commission or the Chairman or any member thereof or against the Central Government, in respect of anything which is in good faith done or intended to be done in pursuance of this Chapter, or of the provisions referred to in section 411, or of any rules or orders made thereunder.

See notes to s. 410.

## CHAPTER VIII

### MISCELLANEOUS PROVISIONS

#### *Contracts where company is undisclosed principal*

**416. Contracts by agents of company in which company is undisclosed principal.**—(1) Every person, being the managing agent, secretaries and treasurers, manager or other agent of a public company or of a private company which is a subsidiary of a public company, who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it is entered into.

(2) Every such person who enters into a contract as aforesaid shall forthwith deliver the memorandum to the company and send copies thereof to each of the directors; and such memorandum shall be filed in the office of the company and laid before the Board of directors at its next meeting.

(3) If default is made in complying with the requirements of this section,—

(a) the contract shall, at the option of the company, be voidable as against the company; and

(b) the person who enters into the contract, or every officer of the company who is in default, as the case may be, shall be punishable with fine which may extend to two hundred rupees.

Sections 416 to 424 (original clauses 378 to 388) deal with certain miscellaneous matters relating to contracts by agents of the company, employees' securities and provident funds etc. (*vide* J.C.R., para 148).

Section 416 is based on s. 91D of the previous Act and the recommendation of the C.L.C. at page 295 of their Report. It is considered impracticable to require that the next meeting of the directors should be held within a period of not more than one month from the date of the contract. Copies of the contract are required to be sent to the directors and it is regarded that in this view of this provision, it would be sufficient if the subject is considered in the ordinary course at the next meeting of the directors. By virtue of s. 285, meetings of the directors have to be held at least once in every three months—*Notes on Clauses*.

Original clause 379 of the Bill has been placed as s. 112 (now s. 113), that is a more appropriate place for the provision in the view of the Committee. Original clause 380 has been omitted as unnecessary in view of s. 218 (now s. 219). The other clauses have been reproduced with certain minor amendments (*vide* J.C.R., para 148).

### *Employees' securities and provident funds*

#### **417. Employees' securities to be deposited in Scheduled Bank.—**

(1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a Scheduled Bank.

(2) No portion of such moneys or securities shall be utilised by the company except for the purposes agreed to in the contracts of service.

(3) A receipt for moneys deposited with a company by its employee shall not be deemed to be a security within the meaning of this section; and the moneys themselves shall accordingly be deposited with a Scheduled Bank as provided in sub-section (1).

SS. 417 to 420 correspond to sub-s. (1) of s. 282B of the previous Act.—*Notes on Clauses*.

**1184. Employee's security money :** Under this section the relation between the company and the employee is one of trustee and *cestui que trust* (29). The amount received by the bank as security from its employees are held by the bank in trust for the employees and they do not form part of the assets of the bank divisible among its creditors (29). Where the trust is complete, provision for payment of interest by the trustee would not make the trustee a debtor (29). Where a person has deposited money with a bank as security for the good behaviour of an

(29) *Gopalakrishnan v. T. N. & Q. Bank* [1939] M. 337, [1939] 1 M.L.J. 209, 183 I.C. 203.

employee, the money so deposited constitutes trust money in the hands of the bank and on the liquidation of the bank the depositor is entitled to priority over other creditors of the bank. Trust moneys are entirely outside the liquidation (30). Where promissory notes are so deposited with a bank, it is impossible for the depositor to trace the subsequent disposal of these notes. That is a matter which is within the special knowledge of the bank and the burden of proof with reference to that is on the bank. Hence if the bank does not produce its accounts in Court, it cannot be heard to say that there is no evidence as to what has become of these promissory notes (31). Where realization of assets of a bank subsequent to its liquidation are really only the previously existing assets present in the bank's strong rooms changed into different forms, the charge in respect of trust moneys deposited with the bank extends also to these subsequent realizations of assets (31). Where the depositor of the aforesaid money serves a notice on a bank demanding return of the money, there is no express revocation of the trust by the demand. On the contrary the demand is to be regarded as a demand for performance of the trust. The trust cannot be extinguished until the purpose of the trust has completely been fulfilled by the return of the trust property to the depositor subject to the lawful claims of the bank against that property (31).

Where a company acting under this section deposits in a scheduled bank moneys deposited with it by its employees in pursuance of their contracts of service, asking the bank to earmark the same as employees' cash security, the fact that the bank receives and accepts the deposit with notice of the above mentioned fact would not, it has been held, make the bank a trustee in respect of the moneys so as to entitle the company to claim preferential payment over the ordinary creditors of the bank on it going into liquidation (32).

As to what is trust money see the case noted below (33).

See notes to s. 529.

#### **418. Provisions applicable to provident funds of employees.—**

(1) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund, shall be either deposited in a Post Office Savings Bank account or invested in the securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882 (II. of 1882):

Provided that where one-tenth part of the whole amount of the moneys belonging to such fund exceeds the maximum amount which may be deposited in a Post Office Savings Bank account under the rules regulating such deposits for the time being in force, the amount of such excess may be kept or deposited in a special account to be opened for the purpose in a Scheduled Bank.

(30) *Dinshaw & Co. v. Mt. Krishna Piyari* [1941] O. 126, [1940] O.W.N. 1022, [1940] O.L.R. 691 relying on *Gopalakrishna v. T. N. & Q. Bank*, *supra*.

(31) *Ibid*.

(32) *Nagar Modern Bank v. T. N. & C. Bank* [1940] M. 178, [1939] M.W.N. 1066.

(33) *Rama Krishna v. Official Liquidator* [1941] 2 M.L.J. 910.

(2) Notwithstanding anything to the contrary in the rules of any provident fund to which sub-section (1) applies or in any contract between a company and its employees, no employee shall be entitled to receive, in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (1), interest at a rate exceeding the rate of interest yielded by such investment.

(3) Nothing in sub-section (1) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognised provident fund within the meaning of clause (a) of section 58A of the Indian Income-tax Act, 1922 (XI of 1922), or where the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8, and 9 of the Indian Income-tax (Provident Funds Relief) Rules.

(4) Where a separate trust has been created by a company with respect to any provident fund referred to in sub-section (1), the company shall be bound to collect the contributions of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees; but in other respects, the obligations laid on the company by this section shall devolve on the trustees and shall be discharged by them instead of by the company.

This section corresponds to sub-ss. (2), (3) and (6) of s. 282 B of the previous Act.

**1185. Provident fund—if trust money** :—When the Alliance Bank of Simla Ltd. went into voluntary liquidation, its employees who were members of a provident fund established by the bank for their benefit, claimed payment in full of the amounts of the balances, standing to their respective credits in the books of the bank, in priority to the unsecured creditors : it was held by Sanderson C. J. and Richardson J. that no distinction could be drawn between these members' subscriptions and the bank's contributions and the credits in respect of interest. Both the subscriptions and the contributions being trust money, the employees were entitled to priority not only in respect of the contributions made by them but also in respect of the contributions made by the bank together with interest provided by the bank. The amounts were the properties of the employees in the possession and under the control of the bank (34). Where the amount of a provident fund lying in deposit in a bank to the credit of the company has not been invested in the authorized securities as provided by this section, the company, is guilty of breach of trust, and the bank, with knowledge of this, must be held to have participated in the breach of trust (35). Vice-Chancellor Malins in *Gray v. Lewis* (36) observed : "All persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds." Where in a

(34) *Macpherson v. Mc. Kechie* [1924] C. 818, 28 C.W.N. 721, 84 I.C. 14.

(35) *East Tanjore E.S.C. Employees' Provident Fund v. O.L. Travancore N. & Q. Bank* [1939] M.W.N. 1068.

(36) [1860] 8 Eq. 526 at p. 543.

company founding a provident fund for its employees, there was a fiduciary relation between the company and the members of the fund, the provident fund deposit account was a trust account, the company was a trustee and the members were therefore entitled to rank as preferential creditors (37). In the last noted case the company had reserved to itself the right to utilize the fund for its own purposes and agreed to pay interest in the meanwhile to each member. Where one of the rules of a provident fund of a company was that in case a member transferred his interest in the fund during his service he was liable to forfeit the amount to the company, it was held that the rule offended against s. 12 of the Transfer of Property Act, 1882 and was void (38). As to what is trust money see the under-noted case (39).

**1186. Where it is a breach of trust :--**Where the amount of the provident fund lying in deposit in a bank to the credit of the company has not been invested in the authorized securities as provided in this section, the company is guilty of a breach of trust, and the bank with knowledge of this must be held to have participated in the breach of trust (40). The fact that a bank is given notice that money deposited is trust money does not however make the bank a trustee thereof (40). The legal consequences of such notice is only that the bank should not participate in a breach of trust by the trustee, because a banker who receives into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts his duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty (41). This section imposes on the company the obligation to invest all provident fund moneys in securities mentioned in s. 20 of the Indian Trusts Act, 1882 and all such moneys belonging to the fund at the commencement of the Companies (Amendment) Act, 1936 which were not so invested should be invested in such securities, by annual instalments not exceeding ten in number and not less in amount than one-tenth of the whole amount of such moneys. On the coming into force of that section, if the said moneys were not so invested as aforesaid, the obligation of the company was to invest a tenth of the said moneys in that year and in every succeeding year in the authorized securities, and the balance of the moneys could be invested in any authorized bank or banks according to the rules of the institution. In so far as the company has not invested the said sum in any authorized security, the company is guilty of a breach of trust and a bank holding the money in deposit must be held to participate in that breach of trust and the bank can therefore be compelled to restore such trust fund, i.e., in respect of so much of the provident fund as it is obligatory on the company to invest in authorized securities (42).

**1187. Where not :--**Where a company had deposited its employee's security fund and provident fund in a bank prior to the coming into operation of the section and the deposit was renewed after that section came into force (i.e., after the 15th January, 1937), it could not be said that the renewal constituted a breach of trust on the ground that the moneys were not invested in approved securities mentioned in s. 20 of the Indian Trusts Act, 1882 as required by the section. So far as the amount of the security was concerned, there could be no breach of trust, because the bank was not a trustee in respect of the same, although the company might be a

(37) *Fazalbhai Mills Ltd.* [1936] B. 206, 38 Bom. L.R. 541, 164 I.C. 328. But see *Malvankar v. Credit Bank of India* [1914] 16 Bom. L.R. 793, 27 I.C. 343.

(38) *In re O'Brien* [1933] C. 701, 60 Cal. 926, 37 C.W.N. 1050.

(39) *Rama Krishna v. Official Liquidator* [1941] 2 M.L.J. 910.

(40) *Desikachari v. Pirrie* [1940] M. 184, [1936] M.W.N. 1068.

(41) *East Tanjore &c. Fund v. O. L. Travancore N. & Q. Bank* (supra) and *Travancore National & Q. Bank* [1940] M. 178, 50 M.L.W. 944, [1939] M.W.N. 1066.

(42) *East Tanjore E. S. C. Employees' Provident Fund v. O. L. Travancore N. & Q. Bank* [1939] M.W.N. 1068.



trustee and the money be trust money in its hands. In regard to the provident fund deposit there could be a breach of trust only in respect of so much of it as was required to be invested in authorized securities, namely, the annual instalments for the year or years in question, and there could be no breach of trust in respect of the balance (43).

**419. Right of employee to see bank's receipt for moneys or securities referred to in section 417 or 418.**—An employee shall be entitled, on request made in this behalf to the company, or to the trustees referred to in sub-section (4) of section 418, as the case may be, to see the bank's receipt for any money or security such as is referred to in sections 417 and 418.

This section corresponds to sub-s. (4) of s. 282 B of the previous Act.

**420. Penalty for contravention of sections 417, 418 and 419.**—Any officer of a company, or any such trustee of a provident fund as is referred to in sub-section (4) of section 418 who, knowingly, contravenes, or authorises or permits the contravention of, the provisions of section 417, 418 or 419, shall be punishable with fine which may extend to five hundred rupees

This section corresponds to sub-s. (5) of s. 282 B of the previous Act.

### *Receivers and Managers*

**421. Filing of accounts of receivers.**—Every receiver of the property of a company who has been appointed under a power conferred by any instrument and who has taken possession, shall once in every half year while he remains in possession, and also on ceasing to act as receiver, file with the Registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates.

SS. 421 to 424 correspond to s. 119 of the previous Act. The provisions applicable to receivers appointed in pursuance of an instrument have been extended to receivers appointed by a Court and also to managers appointed in pursuance of an instrument. There will be little difference in practice between their case and that of a receiver appointed in pursuance of an instrument. The English Act of 1948 refers both to receivers and managers. See Part VI of the English Act and especially s. 369—*Notes on Clauses*.

S. 421 corresponds to sub-s. (1) of s. 119 of the previous Act. See notes to s. 136 *ante*.

**422. Invoices, etc., to refer to receiver where there is one.**—Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by

(48) Trichinopoly T. H. P. Fund v. O. L. Travancore National & Q. Bank [1939] M.W.N. 1069.

or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

This section corresponds to sub-s. (2) of s. 119 of the previous Act. See notes to s. 421.

**423. Penalty for non-compliance with sections 421 and 422.—**

If default is made in complying with the requirements of section 421 or 422, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to two hundred rupees.

For the purposes of this section, the receiver shall be deemed to be an officer of the company.

This section corresponds to sub-s. (3) of s. 119 of the previous Act. See notes to s. 421.

**424. Application of sections 421 to 423 to receivers and managers appointed by Court and managers appointed in pursuance of an instrument.—**The provisions of sections 421, 422 and 423 shall apply to the receiver of, or any person appointed to manage, the property of a company, appointed by a Court or to any person appointed to manage the property of a company under any powers contained in an instrument, in like manner as they apply to a receiver appointed under any powers contained in an instrument.

This section is new. See notes to s. 421.

**Form :—**For the form of receiver or manager's abstract of receipts and payments pursuant to this section read with s. 421, see Form No. 36 in Annexure 'A' of the Companies (Central Government's) General Rules and Forms, 1956—printed as Appendix B.







